

123

①

Supreme Court, U.S.
FILED

No. _____ 081154 MAR 13 2009

OFFICE OF THE CLERK

In The

Supreme Court of the United States

—————◆—————
BRENT DEE JOHNSON,

Petitioner,

vs.

CLARENDON NATIONAL INSURANCE COMPANY,
AMERICAN TRANS-FREIGHT, LLC,
ATF TRUCKING, LLC, and ATF LOGISTICS, LLC,

Respondents.

—————◆—————
**On Petition For A Writ Of Certiorari
To The Court Of Appeals Of Georgia**

—————◆—————
PETITION FOR A WRIT OF CERTIORARI

—————◆—————
KENNETH L. SHIGLEY
CHAMBERS, AHOLT & RICKARD, LLP
1360 Peachtree Street, Suite 910
Atlanta, Georgia 30309

Phone: 404.253.7866
Fax: 404.253.7875
Email: ken@carllp.com

Counsel for Petitioner

QUESTIONS PRESENTED

1. Federal law requires interstate motor carriers to enter leases with owner-operator truckers and assume vicarious responsibility for them as statutory employees. Regulations define "motor carrier" to include an agent, "employee" to include an independent contractor, and "lease" to include a "contract or arrangement." In this case, a carrier appointed an agent who informally hired an unqualified owner-operator without use of the word "lease." Can a carrier thus immunize itself from responsibility to the public through an informal hiring arrangement that evades compliance with the lease requirement?
2. This Court has long held that federal safety regulations must be liberally construed to effectuate their remedial purpose. May a state court construe the Motor Carrier Act more strictly and narrowly than the text of Federal Motor Carrier Safety Regulations promulgated by the agency to which Congress delegated authority to administer the Act?
3. Do the Motor Carrier Act and the Federal Motor Carrier Safety Regulations preempt state laws that set lower standards for safety and financial responsibility?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all parties appearing here and before the Georgia Court of Appeals and Georgia Supreme Court:

Brent Dee Johnson

Clarendon National Insurance Company

American Trans-Freight, LLC

ATF Trucking, LLC

ATF Logistics, LLC

Parent companies:

Transport Industries, L.P.

Transport Industries Holdings, L.P.

Transport Industries Holdings, Inc.

GWLS Holdings, Inc.

TABLE OF CONTENTS

	Page
Questions Presented.....	i
Parties To The Proceeding.....	ii
Table of Contents.....	iii
Table of Authorities	vii
Opinions Below.....	1
Jurisdiction	1
Constitutional Provisions and Statutes Involved	1
Statement of the Case	7
A. Federal questions were raised at every step of pretrial, trial and appellate pro- ceedings.....	7
B. Factual background	9
Argument and Citation of Authority	12
A. This case is of significant national impact because the holding of the lower court pro- vides a roadmap for interstate motor carri- ers to evade compliance with the national system of safety regulation and financial responsibility to the public by having their agents hire trucks and drivers through in- formal arrangements that avoid use of the word "lease.".....	12
B. The time is ripe for the Court to grant certiorari in this case, as it has not decided a case touching on federal motor carrier safety or financial responsibility issues in thirty-four years.....	15

TABLE OF CONTENTS – Continued

	Page
C. The Georgia Court of Appeals decided important questions of federal law in a way that conflicts with relevant decisions of the Supreme Court, Federal Circuit Courts of Appeal, and Courts of Last Resort in other States	17
i. Federal law requires that interstate motor carriers be accountable to members of the traveling public for safety and financial responsibility of “independent owner-operators” hired to haul freight for them. The Georgia Court of Appeals decision disregarding federal law threatens public safety and undermines the economic competitiveness of law-abiding motor carriers and owner-operators.....	17
ii. The Regulations establish a floor but not a ceiling for motor carrier safety and financial responsibility. The lower court failed to uphold the preemptive effect of the Regulations and applied a lower standard of safety and financial responsibility than is required of interstate motor carriers.....	21
iii. The lower court construed Federal Motor Carrier Safety Regulations in a strict, narrow and constrictive manner to defeat their purpose, rather than liberally to effectuate their remedial purpose	23
Conclusion.....	24

TABLE OF CONTENTS – Continued

	Page
Table Of Appendices	
A Georgia Court of Appeals – Decision.....	App. 1
B Judgment of Superior Court of Gordon County, Georgia.....	App. 15
C Georgia Court of Appeals – Denial of Motion for Reconsideration	App. 18
D Order on Defendant’s Motion for Summary Judgment.....	App. 21
E Trial Transcript Excerpts on Motions for Directed Verdict	App. 23
F Supreme Court of Georgia – Denial of Petition for Certiorari.....	App. 44
G Supreme Court of Georgia – Order Deny- ing Motion for Reconsideration	App. 45
H Plaintiff’s Brief in Opposition to Motion for Summary Judgment, by Defendants Clarendon National Insurance Company, American Trans-Freight, LLC, ATF Truck- ing, LLC, ATF Logistics, LLC.....	App. 46
I Plaintiff’s Trial Memorandum	App. 75
J Plaintiff’s Requests to Charge Excerpts ...	App. 119
K Trial Transcript Excerpts: Requests to Charge and Jury Instructions	App. 133
L Georgia Court of Appeals – Brief of Appel- lee Amended and Corrected.....	App. 173
M Georgia Court of Appeals – Motion for Reconsideration.....	App. 208

TABLE OF CONTENTS – Continued

	Page
N Supreme Court of Georgia – Petition for Writ of Certiorari	App. 242
O Supreme Court of Georgia – Motion for Reconsideration.....	App. 271

TABLE OF AUTHORITIES

Page

CASES

<i>American Trucking Ass'ns v. U.S.</i> , 344 U.S. 298, 73 S.Ct. 307 (1953).....	15, 17, 18
<i>B & C Truck Leasing, Inc. v. I.C.C.</i> , 283 F.2d 163 (10th Cir. 1960)	18
<i>Bilyou v. Dutchess Beer Distributors, Inc.</i> , 300 F.3d 217 (2nd Cir. 2002).....	13
<i>Caballero v. Archer</i> , 2007 WL 628755, 2007 U.S. Dist. LEXIS 12271 (W.D.Tex.2007)	20
<i>Canal Ins. Co. v. Distribution Services, Inc.</i> , 320 F.3d 488 (4th Cir. 2003)	18
<i>Clarendon Nat. Ins. Co. v. Johnson</i> , 293 Ga.App. 103, 666 S.E.2d 567 (2008).....	1
<i>Cox v. Bond Transp., Inc.</i> , 53 N.J. 186, 249 A.2d 579 (N.J. 1969)	19
<i>Crescent Express Lines v. U.S.</i> , 320 U.S. 401, 64 S.Ct. 167, 88 L.Ed. 127 (1943).....	23
<i>Empire Fire & Marine Ins. Co. v. Guaranty Nat'l Ins. Co.</i> , 868 F.2d 357 (10th Cir. 1989).....	13
<i>Georgia Truck System, Inc. v. I.C.C.</i> , 123 F.2d 210 (5th Cir. 1941)	23
<i>Hartford Ins. Co. v. Occidental Fire & Cas. Co.</i> , 908 F.2d 235 (7th Cir. 1990)	19
<i>Hillsborough County, Fla. v. Automated Medi- cal Laboratories, Inc.</i> , 471 U.S. 707, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985).....	21

TABLE OF AUTHORITIES – Continued

	Page
<i>Hodges v. Delta Airlines Inc.</i> , 44 F.3d 334 (5th Cir. 1995)	21
<i>Integral Ins. Co. v. Lawrence Fulbright Trucking, Inc.</i> , 930 F.2d 258 (2nd Cir. 1991)	14
<i>Johnson v. Pacific Intermountain Express Co.</i> , 662 S.W.2d 237 (Mo. 1983)	18
<i>Maryland v. Louisiana</i> , 451 U.S. 725 (1981)	21
<i>McCullough v. Maryland</i> , 17 U.S. 316 (1819)	21
<i>McDonald v. Thompson</i> , 305 U.S. 263, 59 S.Ct. 176, 83 L.Ed. 164 (1938)	23
<i>Mellon Nat. Bank & Trust Co. v. Sophie Lines, Inc.</i> , 289 F.2d 473 (3d Cir. 1961)	18
<i>Piedmont & N. Ry. Co. v. I.C.C.</i> , 286 U.S. 299, 52 S.Ct. 541, 76 L.Ed. 1115 (1931)	23
<i>Planet Ins. Co. v. Transport Indem.</i> , 823 F.2d 285 (9th Cir. 1987)	18
<i>Price v. Westmoreland</i> , 727 F.2d 494 (5th Cir. 1984)	14, 22
<i>Rodriguez v. Ager</i> , 705 F.2d 1229 (10th Cir. 1983)	18
<i>Saullo v. Douglas</i> , 957 So.2d 80 (Fla.App. 5 Dist., 2007)	20
<i>Simmons v. King</i> , 478 F.2d 857 (5th Cir. 1973)	14, 18
<i>Transamerica Ins. Co. v. Maryland Cas. Ins. Co.</i> , 166 Ariz. 219, 801 P.2d 454 (1990)	19

TABLE OF AUTHORITIES – Continued

	Page
<i>Transamerican Freight Lines v. Brada Miller Freight Systems</i> , 423 U.S. 28, 96 S.Ct. 229, 46 L.Ed.2d 169 (1975).....	16
<i>White v. Excalibur Ins. Co.</i> , 599 F.2d 5052 (5th Cir. 1979), <i>cert. denied</i> , 444 U.S. 28, 96 S.Ct. 229 (1975).....	12
<i>Wyckoff Trucking, Inc. v. Marsh Bros. Trucking Service, Inc.</i> , 58 Ohio St. 3d 261, 569 N.E.2d 1049 (1991).....	18
<i>Wyeth v. Levine</i> , ___ S.Ct. ___, 2009 WL 529172 (2009).....	21
<i>Zamalloa v. Hart</i> , 31 F.3d 911 (9th Cir. 1994).....	18, 19

CONSTITUTIONAL PROVISIONS

United States Constitution, Article VI, Clause 2	1, 21
--	-------

STATUTES

28 U.S.C. § 1257	1
28 U.S.C. § 2101(c)	1
28 U.S.C. § 2104	1
49 U.S.C. § 113(b)	2
49 U.S.C. § 31136.....	3, 22
49 U.S.C. § 31139.....	4, 22
49 U.S.C. § 14102	2, 13

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS

49 C.F.R. § 376.2	7, 17, 20, 22, 24
49 C.F.R. § 376.11	7
49 C.F.R. § 376.12	7
49 C.F.R. § 387.1	5
49 C.F.R. § 390.5	5, 17, 22, 23
49 C.F.R. § 392.1	5, 17
49 C.F.R. § 392.2	6, 22

MISCELLANEOUS AUTHORITIES

<i>House Report No. 2425 – Motor Carriers – Trip Leasing, 3 U.S. Code Cong. and Ad. News, 84th Cong.2d Sess., p. 4304 (1956).....</i>	13
---	----

OPINIONS BELOW

The Opinion of the Georgia Court of Appeals is reported at *Clarendon Nat. Ins. Co. v. Johnson*, 293 Ga.App. 103, 666 S.E.2d 567 (2008), and is reprinted in the Appendix to this Petition at A. The Georgia Supreme Court's denial of certiorari is in the Appendix at F and its denial of the Motion for Reconsideration is reprinted in the Appendix to this Petition at G. The judgment of the trial court is not reported but in the Appendix at B.

JURISDICTION

This petition for a writ of certiorari is filed within 90 days of the date of the Supreme Court of Georgia's denial of the motion for reconsideration on December 16, 2008. Appendix G. Jurisdiction is invoked and conferred by 28 U.S.C. §§ 1257, 2101(c) and 2104. The judgment is final and is not subject to further review in the state courts.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article VI, Clause 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of

the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

**Federal Motor Carrier Safety Administration,
49 U.S.C. § 113(b):**

Safety as Highest Priority. – In carrying out its duties, the Administration shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in motor carrier transportation.

Transportation – Part B – Motor Carriers, Water Carriers, Brokers, and Freight Forwarders, Leased Motor Vehicles, 49 U.S.C. § 14102:

(a) **General Authority of Secretary.** – The Secretary may require a motor carrier providing transportation subject to jurisdiction under subchapter I of chapter 135 that uses motor vehicles not owned by it to transport property under an arrangement with another party to –

(1) make the arrangement in writing signed by the parties specifying its duration and the compensation to be paid by the motor carrier;

(2) carry a copy of the arrangement in each motor vehicle to which it applies during the period the arrangement is in effect;

(3) inspect the motor vehicles and obtain liability and cargo insurance on them; and

(4) have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary on safety of operations and equipment, and with other applicable law as if the motor vehicles were owned by the motor carrier.

**Commercial Motor Vehicle Safety - 49 U.S.C.
§ 31136. United States Government regulations:**

(a) Minimum safety standards. - Subject to section 30103(a) of this title, the Secretary of Transportation shall prescribe regulations on commercial motor vehicle safety. The regulations shall prescribe minimum safety standards for commercial motor vehicles. At a minimum, the regulations shall ensure that -

(1) commercial motor vehicles are maintained, equipped, loaded, and operated safely;

(2) the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely;

(3) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely and the periodic physical examinations

required of such operators are performed by medical examiners who have received training in physical and medical examination standards and, after the national registry maintained by the Department of Transportation under section 31149(d) is established, are listed on such registry; and

(4) the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators.

**Commercial Motor Vehicle Safety - 49 U.S.C.
§ 31139. Minimum financial responsibility for
transporting property:**

(b) General requirement and minimum amount. - (1) The Secretary of Transportation shall prescribe regulations to require minimum levels of financial responsibility sufficient to satisfy liability amounts established by the Secretary covering public liability, property damage, and environmental restoration for the transportation of property by motor carrier or motor private carrier (as such terms are defined in section 13102 of this title) in the United States between a place in a State and -

(A) a place in another State;

(B) another place in the same State through a place outside of that State; or

(C) a place outside the United States.

(2) The level of financial responsibility established under paragraph (1) of this subsection shall be at least \$750,000.

**Federal Motor Carrier Safety Regulations, 49
C.F.R. § 392.1:**

Every motor carrier, its officers, *agents*, representatives, and employees responsible for the management, maintenance, operation, or driving of commercial motor vehicles, or the hiring, supervising, training, assigning, or dispatching of drivers, shall be instructed in and comply with the rules in this part.

**Federal Motor Carrier Safety Regulations, 49
C.F.R. § 387.1:**

The purpose of these regulations is to create additional incentives to motor carriers to maintain and operate their vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways.

**Federal Motor Carrier Safety Regulations, 49
C.F.R. § 390.5:**

Motor carrier means a for-hire motor carrier or a private motor carrier. The term *includes* a motor carrier's *agents*, officers and representatives as well as *employees responsible for hiring, supervising, training, assigning, or dispatching of drivers* and employees concerned with the installation, inspection, and maintenance of motor vehicle equipment

and/or accessories. For purposes of subchapter B, this definition includes the terms employer and exempt motor carrier.

Employee means any individual, other than an employer, who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety. Such term includes a driver of a commercial motor vehicle (including an *independent contractor* while in the course of operating a commercial motor vehicle), a mechanic, and a freight handler. . . .

Employer means any person engaged in a business affecting interstate commerce who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate it, but such term does not include the United States, any state, any political subdivision of a State, or an agency established under a compact between States approved by the Congress of the United States.

Federal Motor Carrier Safety Regulations, 49 C.F.R. § 392.2:

Every commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. However, if a regulation of the Federal Highway Administration imposes a higher standard of care than that law, ordinance or regulation, the Federal Highway Administration regulation must be complied with.

Federal Motor Carrier Safety Regulations, 49 C.F.R. § 376.2(e):

Lease – A contract or arrangement in which the owner grants the use of equipment, with or without driver, for a specified period to an authorized carrier for use in the regulated transportation of property, in exchange for compensation.

Federal Motor Carrier Safety Regulations, 49 C.F.R. § 376.11 and 49 C.F.R. § 376.12 specify detailed contents of written commercial motor vehicle leases.

Federal Motor Carrier Safety Regulations, 49 C.F.R. § 376.12(c)(1):

The lease shall provide that the authorized carrier lessee shall have exclusive possession, control and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

STATEMENT OF THE CASE

A. Federal questions were raised at every stage of pretrial, trial and appellate proceedings.

The Superior Court of Gordon County, Georgia, entered judgment for Johnson and against the respondents based upon a jury verdict for compensatory

damages in the amount of \$2,345,940.17. [Appendix B] The Court of Appeals of Georgia reversed and denied a motion for reconsideration. [Appendix A and C] The Supreme Court of Georgia denied a petition for certiorari and motion for reconsideration. [Appendix N, O and G]

The preemptive effect of the Federal Motor Carrier Safety Regulations referred to in this petition was raised before trial in response to a motion for summary judgment [Appendix H, R. Vol. 2 at 932; Appendix D], and during trial in a trial memorandum [Appendix I, R. Vol. 3 at 1654], in requests for jury instructions [Appendix J, R. Vol. 1 at 219] and arguments on trial motions [Appendix K, Tr. Transcr. R. Vol. 5 at 504-510; R. Vol. 5 at 513-521; R. Vol. 5 at 523-525; R. Vol. 5 at 545-551]. The trial court ruled in favor of Johnson on applicability of the Regulations [Appendix E, Tr. Transcr. R. Vol. 4 at 317-325; R. Vol. 5 at 487-497], and instructed the jury on the Regulations [Appendix K, Tr. Transcr. R. Vol. 5 at 504-510; R. Vol. 5 at 513-521; R. Vol. 5 at 523-525; R. Vol. 5 at 545-551]. Applicability of the Regulations was argued in the Court of Appeals of Georgia [Appendix L], which reversed the trial court, holding that the Regulations did not apply [Appendix A]. The same issues were argued on a petition for certiorari to the Supreme Court of Georgia, which denied certiorari without opinion [Appendix N and F].

Petitioner filed a motion to vacate the denial of certiorari and denial of motion for reconsideration in the Supreme Court of Georgia, on the ground that

Respondents' Chapter 11 bankruptcy stay was in effect. Petitioner also filed in that court a notice of intent to file a petition for writ of certiorari in this Court. On March 9, 2009, the Supreme Court of Georgia denied the motion to vacate the notice of intent. However, denial of the notice of intent appears to be a nullity, as no state court has authority to prevent this Court from considering a petition for a writ of certiorari on questions of federal law.

B. Factual background.

American Trans-Freight, LLC, ATF Trucking, LLC, and ATF Logistics, LLC, identified themselves jointly and collectively by contract as "ATF" and as "a motor carrier in interstate commerce." [R. Vol. 4, T. 45.4-18, 366.6-11, Vol. 5, T. 571, 399.12-22]. The ATF entities were indistinguishable to the public and to their agent. [R. Vol. 4, T. 357.6-13, 358.12-15, 367.23-368.15, 374.17-25, 379.20-380.7, 388.6-389.11, Vol. 5, T. 398.22-7, 400.8-13, 409.20-410.17, 411.3-412.7, 412.12-19, 414.2-4].

For consolidation of carpet shipments in northwest Georgia, ATF recruited C&C, a small trucking company that had lost its motor carrier authority. C&C and any drivers it hired operated thereafter only under the motor carrier authority of ATF. [R. Vol. 4, T. 42.8-43.4, 43.10-20, 90.14-91.6, 99.13-15, 100.7-12, 101.23-25, 354.3-23, 356.11-16].

ATF required C&C to make "all necessary and customary arrangements" for consolidation of loads

[R. Vol. 4, T. 366.20-367.12]. ATF knew that the arrangements its agent made included regularly sending trucks and drivers to pick up and deliver hundreds of loads to consolidate for interstate shipment under the authority of ATF. [R. Vol. 4, T. 356.22-357.5, 366.24-367.12, 374.17-25].

Robert W. Carnley, son of the owners of C&C, attended meetings in which ATF recruited and signed C&C to the agency agreement. [R. Vol. 4, T. 39.19-41.4, 64.22-65.4, 68.13-14, 80.23-84.13, 388.6-389.1]. Then he bought a 26,000 pound truck and regularly used it to haul carpet on the highways at the request of C&C, as agent for ATF, under interstate bills of lading with no motor carrier authority other than that of ATF. [R. Vol. 4, T. 64.22-65.4, 103.22-105.10, 363.22-364.3; 60.18-20, 75.17-76.1, 90.14-91.6, 100.7-101.25, 363.22-364.3, 392.10-14].

ATF and its agent C&C made no effort to require Carnley to understand or comply with any motor carrier registration, insurance, safety regulation or CDL or truck lease regulations. [R. Vol. 4, T. 367.23-268.15, 374.17-25, 389.2-11, Vol. 5, T. 409.20-410.17]. He lived with ATF's agent, so a jury could infer that ATF's agent knew he was blind in one eye and did not qualify for the Commercial Drivers License required in interstate trucking. [R. Vol. 4, T. 390.9-12, 70.8-19, 385.17-19].

On August 28, 2003, Carnley was dispatched by ATF's agent, C&C, to pick up an interstate shipment of carpet. The bill of lading showed a destination in

California and identified the "carrier" as "C&C/ATF." [R. Vol. 4, T. 391.22-392.1, 375.8-25, Vol. 5, T. 572, Ex. P-2]. Billing for this load was done through ATF, as the billing summary was transmitted to shipper from kbenton@AmericanTransFreight.com [R. Vol. 4, T. 363.4-12, Vol. 5, T. 573, Ex. P-3]. ATF admitted at trial that this type of shipment is in interstate commerce, [R. Vol. 5, T. 401.24-402.11]; that all interstate shipments must be handled under the authority of a certificated motor carrier for protection of the motoring public [R. Vol. 5, T. 402.12-403.17, 408.24-409.5]; and that the definition of motor carrier includes agents [R. Vol. 5, T. 404.19-23].

While hauling an ATF interstate load for which he was dispatched by ATF's agent C&C, under no authority but that of ATF, Carnley illegally passed on a double yellow line a vehicle that had stopped to turn at an intersection, and collided in the intersection with Johnson, causing serious permanent injury. [R. Vol. 4, T. 24-32, 142-148, 163-183, 186-191, 193-194, 197-245, 286.22-289, 385.25-386.2, Vol. 5, T. 582, Ex. P-12, Vol. 5, T. 468.17-471.13, Vol. 5, T. 579, Ex. P-9, T. 483.9-484.9].

ARGUMENT AND CITATION OF AUTHORITY

- A. This case is of significant national impact because the decision of the lower court provides a roadmap for interstate motor carriers to evade compliance with the national system of safety regulation and financial responsibility to the public by having their agents hire noncompliant trucks and drivers through informal arrangements that merely avoid use of the word "lease."**

The lower court's ruling allows violation of one of the Federal Motor Carrier Safety Regulations to exempt motor carriers from compliance with the rest of the regulations, thus enabling them to immunize themselves through semantics. In this time of economic turmoil, motor carriers are freed to roll back the clock more than half a century to the type of abuse that the 1956 adoption of the "statutory employer" rule was designed to eliminate.

This case should be viewed against the backdrop of a long history of motor carriers using creative subterfuges to avoid financial responsibility for people harmed by trucks hauling freight for them. During the first half of the twentieth century, many interstate motor carriers attempted to immunize themselves from liability for the negligence of their drivers by leasing trucks and nominally classifying the drivers who operated the trucks as "independent contractors." See *White v. Excalibur Ins. Co.*, 599 F.2d 50, 52 (5th Cir. 1979), *cert. denied*, 444 U.S. 965, 100 S.Ct. 452, 62 L.Ed.2d 377 (1979) (summarizes the

history of the statutory employer rule); *Empire Fire & Marine Ins. Co. v. Guaranty Nat'l Ins. Co.*, 868 F.2d 357, 362 (10th Cir. 1989) (same). Others have employed "buy-sell" schemes as a subterfuge. See, e.g., *Bilyou v. Dutchess Beer Distributors, Inc.*, 300 F.3d 217 (2nd Cir. 2002).

Because trip-leasing made it difficult for a member of the public injured by the operation of a leased vehicle to fix carrier responsibility, and in order to protect the public from the tortious conduct of the often judgment-proof truck-lessor operators, Congress amended the Interstate Common Carrier Act in 1956 to require interstate motor carriers to assume full direction and control of the vehicles that they leased "as if they were the owners of such vehicles." See Act of Aug. 3, 1956, Pub.L. No. 84-957, 1956 U.S.C.C.A.N. 1163, *House Report No. 2425 - Motor Carriers - Trip Leasing*, 3 *U.S. Code Cong. and Ad. News*, 84th Cong.2d Sess., p. 4304 (1956). The current version of the statute contains the same requirement, but it is worded a little differently. It requires carriers to assume full direction and control of the leased vehicles "as if the motor vehicles were owned by the motor carrier." 49 U.S.C.A. § 14102(a)(4). The purpose of the amendments to the Act was to ensure that interstate motor carriers would be fully responsible for the maintenance and operation of the leased equipment and the supervision of the borrowed drivers, thereby protecting the public from accidents, preventing public confusion about who was financially responsible if accidents occurred, and providing financially

responsible defendants. See, e.g., *Price v. Westmoreland*, 727 F.2d 494, 495-96 (5th Cir. 1984); *Simmons v. King*, 478 F.2d 857, 866-67 (5th Cir. 1973). *Integral Ins. Co. v. Lawrence Fulbright Trucking, Inc.*, 930 F.2d 258, 261 (2nd Cir. 1991).

Thus, since 1956, owner-operators who are independent contractors in relation to motor carriers have been considered "statutory employees" of the carriers in relation to any injured member of the public.

The Georgia decision disregards or misconstrues the Regulations and conflicts with decisions of federal courts of appeal and the supreme courts of other states. It provides judicial imprimatur for motor carriers to circumvent all responsibility for owner-operator drivers by avoiding either execution of a written lease or use of the word "lease" in an oral arrangement. Moreover, this decision enables interstate motor carriers to hire without accountability unqualified owner-operator drivers who have no motor carrier authority and no commercial driver's license, and who make no pretense of complying with any motor carrier safety and insurance regulations.

If this decision stands, interstate trucking companies that are inclined to evade safety and financial responsibility rules will be able to revert to the pre-1956 practice of using non-compliant, unqualified and financially incapable "independent contractor" truckers for whom the carriers would bear no responsibility to the public. Avoiding the expense of equipment maintenance, safety management and financial

responsibility required by federal law, they could undercut the cost structure of law-abiding motor carriers and owner-operators, subjecting lawful trucking operations to unfair competition from those that exploit this loophole.

As bad drives out good, if the Georgia decision approving the evasion of carrier responsibility stands, the safety of the public on highways throughout the United States will be adversely impacted.

B. The time is ripe for the Court to grant certiorari in this case, as the body of law on motor carrier safety and financial responsibility to the public has grown and developed conflicts without substantial guidance from the Supreme Court for more than a generation.

This Court has only twice addressed issues of motor carrier safety and financial responsibility. *American Trucking Ass'ns v. U.S.*, 344 U.S. 298, 304-05, 73 S.Ct. 307, 311-12, 97 L.Ed. 337 (1953), detailed problems and abuses that threatened public interest and vitality of trucking industry. The Court observed that allowing avoidance of motor carrier financial responsibility for owner-operators as independent contractors "is an unnatural construction of the Act which would require the Commission to sit idly by and wink at practices that lead to violations of its provisions." Later, in a case dealing only with the relationship between carriers and owner-operators rather than responsibility to the public, the Court

held that contractual indemnification of motor carriers by lessor owner-operators was not prohibited, as safety was the primary concern and ultimate operational control and responsibility must be in the motor carrier. *Transamerican Freight Lines v. Brada Miller Freight Systems*, 423 U.S. 28, 96 S.Ct. 229, 46 L.Ed.2d 169 (1975).

In the ensuing decades, without further guidance from the Supreme Court, an extensive body of statutory, regulatory and case law regarding safety and responsibility of motor carriers and the treatment of owner-operators as "statutory employees" has evolved. Confusion and conflict in lower courts has led to some courts being unable to comprehend and apply federal law regarding the responsibility of interstate motor carriers for the acts of owner-operators, as in this case. It is time for the Supreme Court to restore clarity.

C. The lower court decided important questions of federal law in a way that conflicts with relevant decisions of the Supreme Court, Federal Circuit Courts of Appeal, and Courts of Last Resort in other States.

- i. Federal law requires that interstate motor carriers be accountable to members of the traveling public for safety and financial responsibility of "independent owner-operators" hired to haul freight for them. The lower court's decision disregarding federal law threatens both public safety and the economic competitiveness of law-abiding motor carriers and owner-operators.**

The plain text of the Regulations, which the Georgia court disregarded, is clear. The definition of "motor carrier" includes "a motor carrier's *agent*," "employee" includes "an *independent contractor* while in the course of operating a commercial motor vehicle." 49 C.F.R. § 390.5, and "lease" includes a "*contract or arrangement* in which the owner grants the use of equipment, with or without driver. . . ." 49 C.F.R. § 376.2. The alternative and disjunctive reference to "*contract or arrangement*" must have some significance other than mere redundancy. Moreover, "[e]very motor carrier, its officers, *agents* . . . *shall be instructed in and comply with the rules.* . . ." 49 C.F.R. § 392.1.

Following the *American Trucking* decision in this Court in 1953 and adoption of the "statutory

employer" rule in 1956, subsequent decisions of the 3rd, 4th, 5th, 7th, 9th and 10th Circuits, and the Supreme Courts of Arizona, New Jersey, Missouri and Ohio further developed that principle. 344 U.S. 298, 304-05, 73 S.Ct. 307, 311-12, 97 L.Ed. 337.

The Act and Regulations were intended, in part, to address abuses that had arisen in the interstate trucking industry which threatened public safety, including the use by motor carriers of leased or borrowed vehicles to avoid financial responsibility for crashes that occurred while goods were being transported in interstate commerce. It would defeat the intent of the Act and the Regulations to enable carriers to benefit from their own failure to comply with the Regulations. Motor carriers must not benefit from the choice to place loads with unauthorized truckers who lack any semblance of operating authority or safety compliance. See, e.g., *Canal Insurance Co. v. Distribution Services, Inc.*, 320 F.3d 488, 489 (4th Cir. 2003); *Zamalloa v. Hart*, 31 F.3d 911 (9th Cir. 1994); *Wyckoff Trucking, Inc. v. Marsh Bros. Trucking Service, Inc.*, 58 Ohio St. 3d 261, 569 N.E.2d 1049 (1991); *Planet Ins. Co. v. Transport Indem.*, 823 F.2d 285 (9th Cir. 1987); *Johnson v. Pacific Intermountain Express Co.*, 662 S.W.2d 237 (Mo. 1983); *Rodriguez v. Ager*, 705 F.2d 1229 (10th Cir. 1983); *Simmons v. King*, 478 F.2d 857 (5th Cir. 1973); *Mellon Nat. Bank & Trust Co. v. Sophie Lines, Inc.*, 289 F.2d 473 (3d Cir. 1961); *B & C Truck Leasing, Inc. v. I.C.C.*, 283 F.2d 163 (10th Cir. 1960).

Although the Regulations require a written truck lease, courts have held that a written lease is not a precondition to imposition of statutory employer liability on motor carriers. See, e.g., *Zamalloa v. Hart*, 31 F.3d 911, 917 (9th Cir. 1994), *et cit.*

These Regulations were intended to safeguard the public by preventing motor carriers from circumventing applicable regulations by leasing the equipment and services of independent contractors exempt from federal regulation. The definition of "lease" as "contract or arrangement" extends to any arrangement by which a carrier allows another to haul its freight for compensation. Any other construction would defeat the Congressional policy of requiring financially responsible interstate transportation. *Hartford Ins. Co. v. Occidental Fire & Cas. Co.*, 908 F.2d 235 (7th Cir. 1990); *Transamerica Ins. Co. v. Maryland Cas. Ins. Co.*, 166 Ariz. 219, 801 P.2d 454 (1990).

An interstate carrier should not be able to evade the Regulations by making an informal arrangement with an owner-operator which attempts to exclude or to limit their application. Thus, when a lessor-operator is engaged by the carrier for operation within the scope of the regulations he becomes a "statutory employee" of the carrier and the relation between them, whether oral or written, is governed by the regulations. *Cox v. Bond Transp., Inc.*, 53 N.J. 186, 249 A.2d 579 (N.J. 1969).

While the carrier in this case did not comply with the requirement of a written contract, it did enter

into an "arrangement" with the unqualified trucker for each day's trip in exchange for compensation. Noncompliance with one requirement must not exempt from compliance with all other requirements. The semantics of failing to use the word "lease" is not determinative of whether there was an "arrangement" which in effect operates as a lease.

The majority rule follows the text and intent of the Regulations. In this case, however, the Georgia court followed a small minority of courts that have strained to apply restrictive principles of state law governing independent contractors in non-trucking contexts rather than apply statutory employer liability to motor carriers. See, e.g., *Saullo v. Douglas*, 957 So.2d 80 (Fla.App. 5 Dist., 2007) (no statutory employer liability for illegal parking of trailer on road shoulder when tractor detached). But the one case the Georgia court relied upon to distinguish between an informal "arrangement" under 49 C.F.R. § 376.2(e) and an "oral lease," involved a claim against a shipper rather than a motor carrier and negligence of a trucker who apparently qualified as motor carrier rather than one who did not. *Caballero v. Archer*, 2007 WL 628755, 2007 U.S. Dist. LEXIS 12271 (W.D.Tex 2007). This reflected the lower court's basic misunderstanding about motor carrier law.

- ii. **The Regulations establish a floor but not a ceiling for motor carrier safety and financial responsibility. The lower court failed to uphold the preemptive effect of the Regulations and applied a lower standard of safety and financial responsibility than is required of interstate motor carriers.**

The Supremacy Clause of the Constitution provides that any state law that conflicts with a federal law is “without effect.” *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) citing *McCullough v. Maryland*, 17 U.S. 316 (1819); see also U.S. Const. Art. VI, cl. 2. Federal law displaces state law where (1) Congress expressly preempts state law; (2) congressional intent to preempt is inferred from the existence of a pervasive regulatory scheme; or (3) state law conflicts with federal law or interferes with the achievement of federal objectives. *Hodges v. Delta Airlines Inc.*, 44 F.3d 334, 336 (5th Cir. 1995). The Supremacy Clause invalidates state laws that “interfere with or are contrary to” federal law. *Hillsborough County, Fla. v. Automated Medical Labs., Inc.*, 471 U.S. 707, 712, (1985).

The lower court’s cramped reading of the Regulations disregards the plain meaning of text, as well as legislative and regulatory history, purpose, and objectives. Whether one follows the reasoning of the majority or the minority in *Wyeth v. Levine*, ___ S.Ct. ___, 2009 WL 529172 (2009), the Act and the Regulations establish minimum standards for motor carrier

safety, a floor but not a ceiling, due to the need for a nationally uniform minimum standard of safety and financial responsibility in interstate trucking.

Congress expressed its clear intent to establish minimum safety standards, 49 U.S.C. § 31136, and minimum financial responsibility requirements, 49 U.S.C. § 31139. The Regulations authorized by Congress and central to this case – 49 C.F.R. § 390.5 (definitions of motor carrier, employer and employee), 49 C.F.R. § 376.2 (definition of lease as “contract or arrangement”) – unambiguously support holding the motor carrier accountable for injury to an innocent member of the traveling public.

The Regulations provide that “[e]very commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. However, if a regulation of the Federal Highway Administration imposes a higher standard of care than that law, ordinance or regulation, the Federal Highway Administration regulation must be complied with.” 49 C.F.R. § 392.2. Thus, the Regulations preempt state law in tort actions in which a member of the public is injured by the negligence of a motor carrier’s employee while operating an interstate carrier vehicle. See, e.g., *Price v. Westmoreland*, 727 F.2d 494 (5th Cir. 1984).

Therefore, the lower court’s disregard for both the text and purpose of key provisions of the Regulations violates the Supremacy Clause.

- iii. **The lower court construed Federal Motor Carrier Safety Regulations in a strict, narrow and constrictive manner to frustrate their purpose, rather than liberally to effectuate their remedial purpose of protecting the traveling public.**

This Court has held repeatedly that that federal safety legislation is to be liberally construed to effectuate its purpose, and that the Motor Carrier Act (along with regulations adopted pursuant to it) is remedial legislation which should be given liberal interpretation. See, e.g., *Crescent Express Lines v. U.S.*, 320 U.S. 401, 409, 64 S.Ct. 167, 88 L.Ed. 127 (1943); *McDonald v. Thompson*, 305 U.S. 263, 59 S.Ct. 176, 83 L.Ed. 164 (1938); *Piedmont & N. Ry. Co. v. I.C.C.*, 286 U.S. 299, 52 S.Ct. 541, 76 L.Ed. 1115 (1931). "It is sufficient for us to say that the [Motor Carrier Act] is a highly remedial one, that its terms are broadly comprehensive enough to bring within them all of those who, no matter what form they use, are in substance engaged in the business of interstate or foreign transportation of property on the public highways for hire. . . ." *Georgia Truck System, Inc. v. I.C.C.*, 123 F.2d 210 (5th Cir. 1941).

However, the lower court stood this rule on its head, construing the Federal Motor Carrier Safety Regulations in a narrow, restrictive manner to defeat the motor carrier's financial responsibility for an injured member of the public. While 49 C.F.R. § 390.5 defines "motor carrier" to include "a motor carrier's agents," and "employees" to include an independent

contractor, the lower court treated the acts of the motor carrier's agent as separate and independent from the motor carrier. Although 49 C.F.R. § 376.2 defines "lease" to include, in the disjunctive, "contract or arrangement," the lower court disregarded the "arrangement" prong of the definition so as to elevate semantics over substance and allow the carrier's failure to enter a written lease to subsume the entirety of the Regulations.

CONCLUSION

To protect the integrity of Federal law, the competitiveness of law-abiding participants in the trucking industry, and the safety of the public on America's highways, the Supreme Court should grant certiorari and set this right.

Respectfully submitted,

KENNETH L. SHIGLEY

Georgia Bar No. 642744

CHAMBERS, AHOLT & RICKARD, LLP

One Midtown Plaza

1360 Peachtree Street, Suite 910

Atlanta, GA 30309

Telephone: 404-253-7862

Facsimile: 404-253-7875

E-mail: ken@carllp.com

Attorney for Petitioner

App. 1

APPENDIX A
FOURTH DIVISION
SMITH, P. J.,
MIKELL and ADAMS, JJ.

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed. (Court of Appeals Rule 4(b) and Rule 37(b), February 21, 2008)
<http://www.gaappeals.us/rules/>

July 11, 2008

In the Court of Appeals of Georgia

A08A0119. CLARENDON NATIONAL INSURANCE
COMPANY SM-006 et al. v. JOHNSON.

SMITH, Presiding Judge.

Clarendon National Insurance Company ("Clarendon"), American Trans-Freight, LLC, ATF Trucking, LLC, and ATF Logistics, LLC appeal from a jury verdict in favor of Brent Johnson in this personal injury case arising out of an accident involving a commercial box truck.¹ Appellants assert that the trial court erred: (1) by denying their motions for directed verdict and judgment notwithstanding the verdict on the issues of vicarious liability and

¹ A "commercial motor vehicle" is "any self-propelled . . . motor vehicle used on a highway in interstate commerce to transport . . . property . . . when the vehicle" weighs more than 10,000 pounds. 49 CFR § 390.5. There is no dispute that the truck at issue in this case weighed 26,000 pounds.

App. 2

stubborn litigiousness; (2) by admitting into evidence a contract and a bill of lading; and (3) in its charge to the jury. For the reasons set forth below, we reverse.

The standard of review

for granting motions for directed verdict and for j.n.o.v. is the same. They may be granted only when no conflict exists in the evidence and the evidence presented, with all reasonable inferences therefrom, demands a particular verdict. On appellate review of the denial of either motion, we construe the evidence in the light most favorable to the verdict and resolve any doubts or ambiguities in favor of the verdict.

American Assn. of Cab Companies v. Parham, Ga. App. (Case No. A7A1785, decided March 21, 2008).

The record shows that on August 28, 2003, Robert Wesley Carnley crossed into the opposite lane of travel and collided with a pick-up truck driven by Johnson when Carnley was unable to stop behind a car that had stopped in an intersection. Carnley told a police officer after the accident that "he was running too fast to stop." Carnley admitted liability at trial and testified that the accident happened when he "rounded a curve and the sunlight was in my eyes and cars stopped in the road and I just misjudged." Carnley is legally blind in his right eye and did not possess a commercial driver's license at the time of the accident. Johnson's injuries from the accident included "fairly severe fracture dislocations" of his

App. 3

left leg that required multiple surgeries to repair and resulted in permanent partial disability.

At the time of the accident, Carnley was hauling a shipment of carpet bound for California under an interstate bill of lading. C&C Motor Freight hired Carnley to pick up the carpet in Calhoun, Georgia and take it to C&C's warehouse in Chatsworth, Georgia, where the carpet shipment would be consolidated with other shipments. Wesley Carnley's father (Robert Carnley) and stepmother (Colleen Carnley) owned and operated C&C Motor Freight. Robert and Colleen Carnley denied that Wesley Carnley was an employee of C&C, claiming instead that he was an independent contractor. Wesley Carnley owned the truck he was driving at the time of the accident.

C&C acted as an independent sales agent under a written contract with American Trans-Freight, LLC, ATF Trucking, LLC, and ATF Logistics, LLC. The agreement specified that the three entities with whom C&C contracted would collectively be referred to in the agreement as "ATF." The agreement contained the following relevant provisions:²

² The agreement contained no provisions relating to liability insurance.

App. 4

WHEREAS, ATF is a motor carrier³ in interstate commerce with certified authority to transport general commodities and desires to appoint agent to act as its independent sales agent in the solicitation of such transportation service business and to arrange for the movement by ATF of such freight, and agent desires to act as such agent.

NOW THEREFORE, it is mutually agreed between the parties as follows:

1. *Designation of Agent.* ATF does hereby designate and appoint agent and agent does hereby consent and agree to act as an independent sales agent for ATF in soliciting from the public, general commodities freight originating at various points throughout the United States, the same to be transported by ATF in its business as an authorized motor carrier of freight in interstate commerce or pursuant to ATF's brokerage authority. . . . If the agent brokers a load to another carrier, it is agent's responsibility to make sure that the carrier has adequate insurance (without sub-limits) to cover the full cargo value of the load. If there is a loss on a

³ Evidence submitted at trial showed that, at the time of the accident, only ATF Trucking, LLC was an authorized motor carrier. ATF Logistics, LLC "was a licensed property broker" and "American Trans-Freight, LLC [wa]s a brand with neither operating authority of trucks or brokerage." As a broker, ATF Logistics "arrange[d] for the transportation of property for others and guarantee[d]" payment for the interstate trucking companies used to transport shipments.

App. 5

load and carrier does not have adequate insurance to reimburse ATF or shipper for the loss, the agent will be held responsible for the deficiency.

2. *Duties of Agent.* Agent will diligently and faithfully serve ATF as an independent sales agent for the term of this agreement utilizing agent's best efforts and abilities to the extent reasonably required. Agent agrees that all freight agent solicits will be exclusively on behalf of ATF and shall be first presented to ATF for acceptance, and if so accepted agent will make all necessary and customary arrangements for the movement of such freight. Agent promises and agrees to comply with all rules and regulations promulgated by ATF, from time to time, relating to the performance as an agent of ATF, including rates and terms for transportation services to be provided by ATF.

3. *Independent Contractor Relationship.* With respect to all matters relating to this agreement, agent shall be deemed to be an independent contractor and shall bear its own expenses in connection with this agreement. Agent has sole responsibility of the day-to-day operation of its business operations and full control and direction of agent's employees. Agent shall not represent itself or its organization as having any relationship to ATF other than that of an independent agent for the limited purposes described in this agreement.

App. 6

...

7. *Settlement of Commissions.* Agent shall be paid weekly based upon a settlement sheet listing all loads for which adequate paperwork to complete the billing has been received by ATF's corporate offices. . . . All billing of customers will be done through ATF's corporate offices in Morrisville, Pennsylvania in accordance with ATF's then current billing practices.

8. Agent agrees to protect, indemnify and hold ATF harmless from any claims arising as a result of agent's performance of its duties and against all losses, direct or consequential damages, costs, expenses, including reasonable attorneys' fees, that may be suffered or incurred by ATF as a result of agent's negligence in performing or failing to perform any of the services or obligations on the part of the agent to be performed pursuant to the terms of this agreement.

An ATF representative explained that agents for ATF "offer trucking services to customers in their area that they control and trucks they controlled." This representative acknowledged that agents would use ATF's motor carrier authority if they did not have their own.

Robert Carnley testified that C&C initially operated as a registered motor carrier with its own DOT number until it "changed over to American Trans-Freight." Al Pinion, "a business development salesman" of ATF, contacted Robert Carnley about

App. 7

leasing his trucks to ATF. Pinion's job included "hunting companies to lease on." Company trucks owned by C&C were leased to ATF. Evidence introduced at trial showed that throughout C&C's relationship with ATF, trucks owned by C&C hauled and operated solely "under ATF's authority as an interstate carrier." Evidence also showed, however, that C&C paid two drivers cash to pick up shipments, drivers who were not driving C&C owned or leased trucks.

Colleen Carnley testified that when she placed a shipment with a carrier leaving C&C's warehouse, she was required to check "on our computer database that we have with ATF to see if they're an approved carrier through ATF. . . . ATF has to have the proper paperwork on them for us to use them to haul a load." Other motor carriers "had to be approved through ATF. We had to send their paperwork and get their approval and they would get a code." According to Colleen Carnley, they could *not* "deal" with other motor carriers of their choosing while they "were under contract with ATF." An ATF representative denied that it exercised any control over what motor carriers C&C could use to haul shipments.

ATF representatives were aware that C&C picked up freight to be consolidated in C&C's warehouse. ATF's director of safety and compliance knew that independent agents of ATF who did not have their own motor carrier authority operated under ATF's motor carrier authority. ATF representatives also knew that C&C did not have its own motor

carrier authority "from the time they signed on with ATF."

Colleen Carnley testified that ATF Logistics handled the billing for C&C's operations. All bills were submitted to ATF Logistics, who in turn billed the various parties involved. When the parties paid ATF Logistics, ATF Logistics then paid C&C. She testified that she paid Wesley Carnley in cash or through a C&C company check and denied billing his charges to anyone else.

All of the Carnleys denied that Wesley Carnley had leased himself or his truck to any ATF defendant at the time of the accident. There is no evidence in the record that ATF had actual knowledge that C&C hired Carnley to pick up loads in Georgia that were designated for delivery out-of-state. Carnley paid for all needed fuel and repairs for his truck. The truck did not have a company name, logo, sign, or DOT numbers displayed on it. Colleen Carnley testified that she had no contact with ATF when she asked Wesley Carnley to pick up the load involved in the accident.

The only bill of lading for the load carried by Carnley at the time of the accident listed the carrier as "C&C/ATF." This document was prepared by the entity requesting shipment of the goods, not C&C or ATF.

Following the accident, Johnson sued Robert Wesley Carnley, Robert Darrell Carnley, Colleen Carnley, C&C Motor Freight, Inc., the three ATF

App. 9

defendants, and ATF's insurer, Clarendon. The ATF defendants asserted a cross-claim against the Carnleys and C&C "for indemnity and contribution by law and contract."

The insurance carrier for the Carnleys and C&C settled with Johnson for \$100,000 before trial. Following a trial, the jury found against the three ATF defendants, Clarendon, and Wesley Carnley in the amount of \$2,345,940.17.⁴ It also found in favor of the ATF defendants on their cross-claim against C&C and the Carnleys in the amount of \$539,566.25.

1. Appellants assert that the trial court erred by denying their motion for directed verdict on the issue of vicarious liability. We agree.

(a) Appellants first argue that they cannot be held vicariously liable because they are not statutory employers under the Federal Motor Carrier Safety Regulations ("FMCSR") as a matter of law. See 49 U.S.C. §§ 31101 et seq. and 49 CFR § 391.1 et seq. "Statutory employment is a theory of vicarious liability created by the FMCSR." *Omega Contracting v. Torres*, 191 SW3d 828, 848 (Tex. App. 2006).

⁴ Compensatory damages totaled \$1,742,845.70, attorney fees totaled \$580,948.57, and expenses totaled \$22,145.90. The defendants were given a \$100,000 set-off for the previous settlement.

The regulations pertinent to this issue follow:

Employee means any individual, other than an employer, who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety. Such term includes a driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle). . . . 49 CFR § 390.5.

Employer means any person engaged in a business affecting interstate commerce who owns or leases a commercial vehicle in connection with that business, or assigns employees to operate it. . . . 49 CFR § 390.5.

The parties agree that the statutory employer issue in this case centers around whether any ATF defendant leased the truck driven by Wesley Carnley at the time of the accident. As there was no written lease agreement between Carnley and any ATF defendant, we must determine whether an oral lease agreement can be implied from the record before us. See 1-7 Law of Commercial Trucking §7.16[5], n. 257 ("there is authority for the proposition that liability may attach to the carrier-lessee, even in the absence of a written trip lease").

Based on the record before us, we cannot find any evidence to support the conclusion that Wesley Carnley leased himself or his truck to an ATF defendant for the trip involved in the accident. All of the Carnleys, as well as ATF representatives, denied that

ATF leased Wesley Carnley's truck or his services as a driver. ATF had no knowledge about C&C's use of Wesley Carnley to transport goods to C&C's warehouse for consolidation and certainly had no contact with Wesley Carnley about the trip resulting in the accident. As a result, we find that the appellants were entitled to a directed verdict in their favor on the issue of statutory employment. See *Caballero v. Archer*, 2007 U.S. Dist. LEXIS 12271 (WD Tex. 2007) (finding no evidence of any oral or written lease agreement).

In so holding, we note that an oral lease cannot be inferred from the fact that one of the ATF defendants held DOT authority to act as a motor carrier and *could* have entered into a lease. See *id.* Likewise, the fact that a third party listed "C&C/ATF" as the motor carrier on the bill of lading does not provide competent evidence of an oral lease. Cf. *Schramm v. Foster*, 341 F.Supp.2d 536, 549 (MD 2004) (identification of party as carrier on bill of lading prepared by third party without any involvement by carrier does not prove party was carrier for trip).

(b) Appellants also assert that they were entitled to a directed verdict on Johnson's claim that they are vicariously liable for C&C's negligent hiring of Wesley Carnley. We agree.

OCGA § 51-2-4 provides that "an employer generally is not responsible for torts committed by his employee when the employee exercises an independent business and in it is not subject to the immediate

direction and control of the employer.”⁵ In order to impose liability

the employer must have retained some degree of control over the manner in which the work was done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, as to operative details. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

(Citations and punctuation omitted.) *Slater v. Canal Wood Corp.*, 178 Ga. App. 877, 880(1) (345 SE2d 71) (1986).

The agreement between the ATF defendants and C&C provided that C&C was an independent contractor with “sole responsibility of the day-to-day operation of its business operations and full control and direction of [C&C]’s employees.” While ATF may have required C&C to use “approved” motor carriers, retention of this general right, without more, did not alter C&C’s status as an independent contractor.

⁵ Compare OCGA § 51-2-5 (delineating exceptions to the general rule, none of which apply here).

ATF did not know that Colleen Carnley hired her stepson to transport a load of carpet to C&C's warehouse for consolidation on the day of the accident, and no evidence presented at trial demonstrated that any ATF defendant exercised control over the day-to-day operations of C&C. Based on this lack of evidence, the trial court erred by denying appellants' motion for directed verdict. See *McLaine v. McLeod*, Ga. App. (Case No. A08A0422, decided May 1, 2008) (freight broker not liable for negligence of motor carrier and its employee driver because they were independent contractors).

(c) A theory of vicarious liability based upon a joint venture between C&C and the ATF defendants also fails to support the verdict against ATF. Vicarious liability for the conduct of another party to a joint venture cannot be established without demonstrating a right by each member of the joint venture to direct and control the conduct of the other. *Rossi v. Oxley*, 269 Ga. 82, 83(1) (495 SE2d 39) (1998). In this case, the crucial element of mutual control is absent. *Id.*

(d) While we are constrained to find under existing law that ATF cannot be held vicariously liable for Johnson's injuries, we are troubled by the result in this case. As one commentator has noted, third party participation in the movement of interstate freight by freight brokers and logistics companies has increased while administrative oversight has diminished. James C. Hardman, *Third Party Surface Transportation – Common Issues and Recent Trends: Third Party Contract Issues Concerning*

Motor Carriers, Brokers, and Shippers, 34 Transp. L. J 307-308 (Fall 2007). In this case, the federal regulations simply do not provide a mechanism for Johnson, an injured member of the public, to recover adequate compensation for his injuries. See *Schramm*, supra, 341 F.Supp.2d at 553 (noting that this is an area "in which the law may have to catch up" and encouraging regulators to act). We cannot, however, allow our sympathy for the plight of those injured by commercial trucks to lead us toward imposing strict liability on a party that does not possess the requisite degree of control over another's conduct. Resolution of this public policy issue lies with the legislative branch of our government, not the judicial.

2. Because no evidence supports Johnson's underlying claim against appellants, appellants are entitled to judgment notwithstanding the verdict on Johnson's claim for attorney fees under OCGA § 13-6-11. See, e.g., *United Companies Lending Corp. v. Peacock*, 267 Ga. 145, 147(2) (475 SE2d 601) (1996) (award of damages on the underlying claim prerequisite to any award of attorney fees under O.C.G.A. § 13-6-11).

3. Appellants' remaining enumerations of error are rendered moot by our holdings in Divisions 1 and 2.

Judgment reversed. Mikell and Adams, JJ., concur.

APPENDIX B

**IN THE SUPERIOR COURT OF GORDON COUNTY
STATE OF GEORGIA**

BRENT DEE JOHNSON,

Plaintiff

v.

**CLARENDON NATIONAL
INSURANCE COMPANY,
AMERICAN TRANS-FREIGHT
LLC, ATF TRUCKING, LLC, CIVIL ACTION FILE
ATF LOGISTICS, LLC, C & C NO. 04-CV-43532
MOTOR FREIGHT, INC.,
ROBERT WESLEY CARNLEY,
ROBERT DARRELL
CARNLEY and COLLEEN
CARNLEY, d/b/a "C & C
Freight" or "C & C Trucking,"**

Defendants.

JUDGMENT

(Filed Mar. 12, 2007)

The above-styled action came on regularly for jury trial, and the jury returned a verdict on March 9, 2007, in favor of Plaintiff and against Defendants American Trans-Freight LLC, ATF Trucking, LLC, ATF Logistics, LLC, and Robert Wesley Carnley, subject to pro tanto setoff of funds already paid to the Plaintiff by the insurer of the C&C and Carnley defendants, as set forth below

App. 16

Compensatory damages for Plaintiff :	\$ 1,742,845.70
Attorney fees for Plaintiff	\$ 580,948.57
Expenses of litigation for Plaintiff	\$ 22,145.90
Total verdict	\$ 2,345,940.17
Less: Pro tanto setoff	\$ 100,000.00
Total Judgment	\$ 2,245,940.17

Therefore, pursuant to the jury's verdict and the setoff required under to a limited liability release previously entered into between the Plaintiff and the C&C and Carnley defendants, judgment is hereby entered in favor of the Plaintiff and against American Trans-Freight LLC, ATF Trucking, LLC, ATF Logistics, LLC, jointly and severally, in the amount of \$2,245,940.17.

On the Cross-Claim of American Trans-Freight LLC, ATF Trucking, LLC, ATF Logistics, LLC, against C & C Motor Freight, Inc., Robert Wesley-Carnley, Robert Darrell Carnley and Colleen Carnley, judgment is hereby entered upon the jury's verdict in favor of Cross-Claim of American Trans-Freight LLC, ATF Trucking, LLC, and ATF Logistics, LLC against C & C Motor Freight, Inc. in the amount of \$539,566.25.

App. 17

SO ORDERED, this 12 day of March, 2007.

/s/ David K. Smith
David K. Smith
Judge, Superior Court
of Gordon County

Presented by:
Kenneth L. Shigley
Shigley Law Firm, LLC
3166 Mathieson Drive
Suite 200
Atlanta, GA 30305
404-364-1999

App. 18

APPENDIX C

**Court of Appeals
of the State of Georgia**

ATLANTA, JUL 31 2008

The Court of Appeals hereby passes the following order:

A08A0119. CLARENDON NATIONAL INSURANCE COMPANY et al. v. JOHNSON.

Upon consideration of the Motion for Reconsideration filed on behalf of appellee in the above styled case, it is hereby ordered that the Motion for Reconsideration is denied. It is further ordered that the "ON MOTION FOR RECONSIDERATION" attached hereto be included with the original opinion dated July 11, 2008.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta JUL 31 2008

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ William L. Martin, III

ON MOTION FOR RECONSIDERATION

In a motion for reconsideration, Johnson asserts that this case “involves a motor carrier’s use of a ‘shell game’ to exempt itself from accountability for financial responsibility and compliance with motor carrier safety regulations.” The record, however, does not support this contention. Instead, it shows that ATF Trucking, LLC complied with Federal Motor Carrier Safety Regulations by leasing trucks owned by C&C, its independent contractor, when these trucks were used to transport goods under ATF’s motor carrier license. The issue in this case is whether ATF can be held liable when its independent agent hired an unqualified driver, who drove his own truck, for a trip of which ATF had no knowledge or involvement, based upon a practice of which ATF had no knowledge. Given the evidence before us, a lease, whether defined as “a contract or arrangement,” simply cannot be implied under the Federal Motor Carrier Safety Regulations. 49 CFR §376.2.

We find no merit in Johnson’s argument that we should apply the Restatement (Second) of Torts § 428 to his claim against ATF, because C&C was not “carrying on the activity” of ATF when it hired Wesley Carnley. See *Gudgel v. Southern Shippers*, 387 F3d 723, 726 (7th Cir. 1967) (finding § 428 did not apply when accident occurred after trip lease expired.) C&C was an independent agent authorized to arrange for the movement of freight by ATF, as well as other motor carriers. In this case, the shipment of carpet bound for California was consolidated with other

loads in C&C's warehouse and shipped to California by a motor carrier other than ATF. Therefore, neither C&C, nor Wesley Carnley, was "carrying on the activity" of ATF with regard to the trip resulting in Johnson's injuries. Restatement (Second) of Torts § 428. For the same reasons, C&C was not acting as ATF's agent with regard to this trip.

Based on the above, we deny Johnson's motion for reconsideration.

APPENDIX D
IN THE SUPERIOR COURT
OF GORDON COUNTY
STATE OF GEORGIA

BRENT DEE JOHNSON,

Plaintiff,

v.

CLARENDON NATIONAL
INSURANCE COMPANY,
AMERICAN TRANS-FREIGHT,
LLC, ATF TRUCKING, LLC,
ATF LOGISTICS, LLC, C & C
MOTOR FREIGHT, INC.,
ROBERT WESLEY CARNLEY,
ROBERT DARRELL
CARNLEY and COLLEEN
CARNLEY d/b/a "C & C
Freight" or "C & C Trucking",

CIVIL ACTION FILE
NO. 04CV43532

Defendants.

ORDER ON DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

(Filed Jul. 31, 2006)

The Court has reviewed the pleadings, affidavits and briefs of all parties. Finding that there are issues of fact to be tried, the motions for summary judgment are **DENIED**.

Mediation is ordered in this case prior to October 15, 2006.

App. 22

This 31st day of July, 2006.

/s/ David K. Smith
David K. Smith
Judge of Superior Court
Cherokee Judicial Circuit

App. 23

APPENDIX E

**IN THE SUPERIOR COURT OF GORDON COUNTY
STATE OF GEORGIA**

BRENT DEE JOHNSON,

Plaintiff

v.

**CLARENDON NATIONAL
INSURANCE COMPANY, CIVIL ACTION FILE
AMERICAN TRANS-FREIGHT NO. 04-CV-43532
LLC, ATF TRUCKING, LLC,
ATF LOGISTICS, LLC, C & C
MOTOR FREIGHT, INC., and
ROBERT WESLEY CARNLEY,**

Defendants.

(March 5, 2007)

**David K. Smith
Judge, Superior Court
of Gordon County**

* * *

[317] operate.

THE COURT: Do you really think Mr. Kassayan over there said in a meeting, you know, tell you what, instead of hiring highly insured small companies to go to Mathews & Parlo and pick up ten, fifteen rolls at a time, instead of doing that let's prey upon companies that are about to lose their insurance and have drivers that aren't really good drivers and

let's just take a chance. That way we don't have to pay them as much. We'll promise to pay them on time. Instead of them having to wait for their money we'll dangle that carrot out there, but we can save a lot of money that way. Do you think you've proven that?

MR. SHIGLEY: Your Honor, I think the circumstantial evidence in this case is sufficient for a jury to reach that conclusion.

THE COURT: I'm going to deny your motion at this time. I will reserve the right to review that one. I mean that motion is timely brought. I'll let you revisit that one after you put up your case.

MR. FISHER: I think, Judge, the next motion goes to directed verdict as to claims against American Trans-Freight, ATF Logistics, and ATF Trucking on the main claim. Now, basically, the plaintiff's entire case is based upon one misunderstanding, misapplication of motor carrier regulations. The entire case is based on a misreading of [318] the motor carrier regulations, but before we get there these are motor carrier regulations which means they don't apply to any entity other than a motor carrier. American Trans-Freight is not a motor carrier. ATF Logistics is not a motor carrier. The only motor carrier in the case is ATF Trucking. ATF Logistics is a registered broker with no trucking authority whatsoever. American Trans-Freight is nothing. It's a name only. It has no authority, trucking, brokerage, or otherwise. So the motion -

THE COURT: Is it a corporation, though?

MR. FISHER: Yes. It's a limited.

THE COURT: It's a corporation that owns
a -

MR. FISHER: It's incorporated in order to
preserve that name.

THE COURT: Okay. I was not clear on
that. I mean I remember that it was the logo.

MR. FISHER: Right. That's all it is is
protection of that name. So it has - I mean it does
nothing. It does nothing, and the motor carrier regu-
lations, of course, would not apply. The regulations do
expressly and specifically define a motor common
carrier. The regulations, rather the code expressly
defines a broker, and without reading those verbatim
a broker is defined as someone other than a motor
common carrier. So a broker cannot be a motor com-
mon carrier and the motor common [319] carrier regs
do not apply to a broker or a non-motor common
carrier. The only basis of liability that the plaintiff
has claimed - now, one other thing, and that is that a
motor common carrier can only haul freight with non-
owned equipment, equipment of other people if
there's a trip lease. The code requires a written trip
lease. The code also provides for an oral trip lease or
an implied trip lease. That is the terms of a trip
lease or the existence of a trip lease will be implied
where there is a trip lease relationship, but the lease
is not written as required. The code requires specific

itemized contents of a written trip lease, and the code provides that a motor carrier cannot haul without one. So in order for there to be – now, the purpose of that is for the motor carrier to assume liability for independent contractors that operate for it or that it hauls or that hauls for it but there, first and foremost, has to be an agreement. There is no such thing and nothing – now, the plaintiff has made the leap there that even if there's not a lease, written or oral, if there's a motor common carrier, one can be implied and thereby create a statutory employer relationship. There is not a single case in this country that supports that theory. Every single case in which there has been an implied lease has been an implied written lease wherein the relationship between the carrier and the operator has been [320] an agreement. In other words, you haul this there under the specific requirements or the specific terms required in a written lease. There is no imputed lease. That is not provided for in the code and there is no case that supports an imputed lease.

THE COURT: Why would you ever want to enter into a written lease, then? You sure can get out of a lot of liability if you –

MR. FISHER: You can't. The only way a motor carrier can haul with somebody else's equipment is to have a written trip lease that specifies the duration of the trip. It provides for inspection of the equipment. It provides for putting a card in the cab of the truck. It is for the purpose of attaching responsibility and liability for that trip, and if that trip is

made and those parties don't write up those terms of the lease then an oral lease containing those terms is implied, but there is no such animal as a motor common carrier sitting somewhere and some unknown entity driving for it and attaching liability to it. That's not the intent of the code and that's not provided for in the code, but that is the basis of plaintiff's claim against the defendants. The plaintiff is claiming, well, there isn't any other motor common carrier. All loads have to be under some motor common carrier, therefore, this load had to be under the authority of ATF [321] Trucking which is a leap that the code and no case, no opinion whatsoever supports. The concept of statutory employee derives from the oral lease. There is no reference to imputing a lease where there is no relationship of an independent driver driving a load for a carrier from point A to point B. Now, the only - that's the theory for ATF Trucking. The only basis of liability that the plaintiff claims against ATF Trucking is the statutory employee implied, inferred or imputed lease when no relationship existed with respect to any trip involved in this case. There is no general trip lease. There's no such thing. It has to be per trip. Now, as far as ATF Logistics is concerned, a broker, motor carrier regs do not apply. The plaintiff is claiming liability as to ATF Logistics based on negligent selection of an incompetent driver.

THE COURT: Let me interrupt. Which is the logo company?

MR. FISHER: That's American Trans-Freight.

THE COURT: Okay. American, I can't read my own writing, Trans-Freight is the logo. Okay.

MR. FISHER: Now, ATF Logistics, the broker, only brokerage authority, no motor carrier authority, therefore, regs do not apply. The only basis of vicarious liability as to Logistics is based on the claim that Colleen Carnley, [322] operating for C&C, negligently selected an incompetent driver. Now, starting at the bottom of that chain there is no evidence that Wesley Carnley, the driver, other than the fact of the accident, was a negligent driver or that Ms. Carnley knew, or should have known, that he was an incompetent driver. The evidence has been that he had operated accident-free for many trips and many loads and, therefore, there was no reason for her to believe that he was an incompetent driver. Now, going a step further, the plaintiff is attempting to impose vicarious liability on ATF Logistics for the negligence, alleged negligence, of a third party, Colleen Carnley. Now, if you look at the sales agreement, that agreement provides that Colleen Carnley specifically and C&C is, for all purposes, an independent contractor without authority to bind any ATF entity to anything; so no negligence on the part of Colleen Carnley, in the first place, in making the selection. She's an independent contractor and, therefore, even if she were –

THE COURT: She is or C&C Freight, Incorporated?

MR. FISHER: Right, right, right. Well, as to her or C&C. There is no imputed negligence to Logistics. Now, the standard that the plaintiff offers to demonstrate negligence is a motor common carrier reg regarding vision requirements of a driver. The regs don't apply to a [323] broker. Colleen Carnley is not a motor carrier and C&C is not a motor carrier. Those regs do not apply. So they cannot be held to have violated that regulation because they don't apply to them. It's not a standard or a standard of care because those regulations do not apply to them, therefore, there is no evidence of a violation of any standard. There's no violation of any regulation it applies to, therefore, there can be no liability as to Logistics. Moreover, Logistics is purely and simply a paperwork conduit, a factor, a way for the Carnleys to handle cash flow better. There is no basis for any active negligence or vicarious negligence on the part of ATF Logistics, under the plaintiff's claims.

THE COURT: Mr. Shigley.

MR. SHIGLEY: Your Honor, the sales agency agreement which was introduced and tendered and accepted into evidence as Plaintiff's Exhibit Number 1, identifies Mr. Fisher's clients as American Trans-Freight, LLC, ATF Trucking, LLC, ATF Logistics, LLC, parentheses, here and after referred to as, quote, ATF, close quote, close paren, and the next paragraph, it says, ATF is a motor carrier in interstate commerce with certified authority to transport general commodities, etcetera. At no point in this contract in which they appoint C&C as

their agent does it ever refer to being just a broker. As no point does it [324] limit or regulate the selection of drivers to haul interstate commerce in the process of load consolidation. The regs include – let me get my hands back on it – at 49CFR371.7, the following provision, a broker shall not directly or indirectly represent its operations to be that of a carrier. Well, they're saying that ATF Logistics is just a broker. They violated that regulation. They're representing themselves to be a carrier. Now, with regard to the statutory employer rule, and I'm not going to go through everything here that will put it in the problem we're at, but fifty-one years ago under the Eisenhower –

THE COURT: I'm going to interrupt.

MR. SHIGLEY: Okay.

THE COURT: I'm going to rule on this motion basically the way that my predecessor would rule on this motion. If you get a judgment you want it to stick, don't you?

MR. SHIGLEY: Yes, sir.

THE COURT: Deep down in your blackest of plaintiff trial attorney hearts, do you think I should dismiss any of these defendants?

MR. SHIGLEY: No, I do not. I think they have chosen to identify themselves jointly together as a motor carrier and wrap it all up into one.

THE COURT: Okay. I do, too. I'm going to deny your motion, but – and I'm not – my law clerk and I have done [325] a lot of research on this this week and I'm not – I don't want you to think that I'm just saying, well, the front page of that says we're all one and he's willing to take his chances against all three of the named defendants, therefore, I'm denying your motion. That's not what I'm doing. I don't want you to think that I'm doing it that flippantly, but there is some method or some purpose for that in asking, you know, are you willing to take your chances against all three of these defendants because regardless of what P-1 says, these LLCs are presumably legitimately created under the laws of Pennsylvania, presumably created for different purposes. I mean these aren't shell corporations. They're a corporation. I would imagine that a trucking company could do all of these functions under one corporate name, couldn't it?

MR. SHIGLEY: There is evidence in the record that they have now taken the broker role and folded it into the trucking company.

THE COURT: Okay. But that's not for the jury, is it?

MR. SHIGLEY: Actually, I think – I think we got that in the record.

THE COURT: Okay. Anyway, I'm going to deny your motion Anything else?

MR. FISHER: Yes, Your Honor. In order to provide Mr. Shigley with fair warning given the thirty-second rule

* * *

[487] (JURY IS RELEASED AT 4:00 P.M.)

THE COURT: Counsel, y'all take about five minutes. Then, we'll take care of some business.

(RECESS)

THE COURT: All right. We're back on the record. The jury is nowhere to be seen. Mr. Melton?

MR. MELTON: On behalf of the Carnley defendant group, Your Honor, I have motions for a directed verdict regarding the cross-claims filed by the ATF group. First of all, regarding the cross-claim for contribution, Robbie -

THE COURT: Well, hold on just a second. Hold on. I guess, formally, I should let Mr. Fisher do what he was going to do as far as resting and tendering.

MR. MELTON: I'm sorry. I thought he did that.

THE COURT: Well, no. I just kind of asked where are we going after this.

MR. MELTON: I beg your pardon.

THE COURT: That's my fault. What say you, Mr. Fisher?

MR. FISHER: For the record, we rest and tender, tender and rest.

MR. MELTON: And for the record, and I guess I'm taking them out of order, so subject to a stipulation that I'd like to recite -

THE COURT: Go ahead and do the stipulation.

[488] MR. MELTON: - the Carnley C&C group will rest as well.

MR. SHIGLEY: And for the record, while Brent would love to get up and say some things about that functional capacity evaluation, we're not going to.

THE COURT: And we'll do this in the morning in front of the jury because I don't think you rested in front of the jury. I'd just prefer for the jury to hear that, so in the morning somebody remind me - Mr. Fisher rests, Mr. Melton rests, no rebuttal.

MR. MELTON: Now, with respect to the situation in lieu of tendering the limited release in-camera, plaintiffs and the defendants, Robert Darrell Carnley, Robert Wesley Carnley, Colleen Carnley, and C&C Motor Freight, Incorporated, individually, corporately in doing business as C&C Trucking and/or C&C Freight have entered into a limited release with plaintiff, Brent Johnson, and have paid to Mr. Johnson available liability insurance policy limits in the amount of One Hundred Thousand Dollars. The limited release is the traditional limited release

whereby plaintiffs have agreed that in return for that payment plaintiffs will seek no further recovery of monetary damages against any of the C&C/Carnley defendants, regardless of the verdict rendered in this case and that plaintiffs have agreed to a setoff in the judgment for the [489] One Hundred Thousand Dollars that's been received. Ken, is that an accurate statement?

MR. SHIGLEY: That's a pretty accurate summary.

THE COURT: All right. Let me remind everybody in the courtroom, I know I don't need to do this, but in no way, shape, form, or fashion should anyone say or do anything to imply to the jury that a partial release has been negotiated between any parties in this case. That is a matter that this jury is not to know about whatsoever. Anything else?

MR. MELTON: And because of the stipulation, I am not tendering in-camera the released document.

THE COURT: All right.

MR. MELTON: The next matter would be directed verdicts regarding cross claim. Would the Court like to hear those this afternoon or in the morning?

THE COURT: Well, we've got a lot to do. I mean we've got that and the jury charge. Go ahead. I mean I may should have told the jury to come back later than I did.

MR. MELTON: The basis for the cross-claim by the ATF defendants sounds in contribution and indemnification. Contribution, I think, can be dealt with easiest. Contribution is a concept that arises under the tort law of the State of Georgia. It is a concept that only applies as between joint tort-feasors. Robert Wesley Carnley is the [490] only tort-feasor in this case. There can be no contribution as between the ATF group, because none of them are tort-feasors, and Robert Wesley Carnley who is the only tort-feasor.

THE COURT: How about negligent selection of Robert Wesley Carnley to actually drive the truck?

MR. MELTON: That's not a claim for contribution.

THE COURT: Okay. All right.

MR. MELTON: There just simply is no contribution and then I'll talk about identity after –

MR. FISHER: We agree with that statement. We're seeking only indemnification.

THE COURT: All right.

MR. MELTON: All right. With respect to indemnification, counsel for ATF has argued – and by the way we've both briefed this – counsel for ATF has argued that they have rights of indemnity both under common law and under the indemnification provisions of Plaintiff's Exhibit Number 1, the sales

agency agreement. My position is that having chosen a more limited scope of indemnification pursuant to the sales agency agreement that was drafted by the ATF group, they are limited to whatever indemnity is provided for in that document and don't have the fall-back position of common law such as it may be. So that's my first point if Mr. Fisher wants to address it.

[491] THE COURT: Okay. Let's address that.

MR. FISHER: As far as the –

THE COURT: Well, is there a particular jury charge that ATF had requested that deals with amore expansive form of indemnification?

MR. MELTON: I'll leave that to Mr. Fisher.

MR. FISHER: Well, Judge, all I can say is there probably is.

THE COURT: Well, I mean regardless of your motion, their claim comes down to that which is defined to a jury, right?

MR. MELTON: I think it comes down to what they've contracted themselves to be able to do.

THE COURT: Yeah, but I just need to figure out –

MR. MELTON: I guess what I'm asking the Court to do is if the Court does not grant my motion, I'm asking the Court to charge the jury that if the

ATF defendants have a cross-claim for indemnification, it's based on the language of P-1, the sales agency agreement.

THE COURT: I'm just looking for -- okay. I found now what I'm looking for. So your motion is to limit their remedies to the contract rather than the common law?

MR. MELTON: So far, yes, sir.

THE COURT: So far.

MR. MELTON: That's where I am right now.

[492] THE COURT: Response?

MR. FISHER: The contract does not waive any rights to seek other remedies that may be available to the entities, don't specifically refer to any tort claims, and our position would be contractually in addition to any rights available by common law.

THE COURT: I'm looking at your requests to charge number twenty-six, twenty-seven, and twenty-eight. I'm just trying to figure out what I would do if I grant your motion or if I deny your motion.

MR. MELTON: If you grant the motion at this juncture and then overrule what I'm about to say next, you would charge the jury that if the jury decides that ATF has the right of indemnification it is governed by the terms of the sales agency agreement, P-1.

THE COURT: Okay. Let me see P-1, please. Thanks. Where are we? What page? Indemnification.

MR. MELTON: Paragraph eight.

THE COURT: Paragraph eight. All right. You said you briefed this. In this voluminous file I have no idea where that brief would be.

MR. FISHER: While he's looking can I just make one point just to point this out?

THE COURT: Yeah.

MR. FISHER: This indemnification agreement refers [493] specifically to indemnification for consequences of failing to perform services and obligations under the agreement. Now, the claim against — of negligent selection

THE COURT: It's not contemplated by the agreement.

MR. MELTON: Which is what I'm going to talk about next.

THE COURT: Okay. Well, go ahead and talk.

MR. MELTON: I think they've preempted their common law claims by entering into a contract that provides for indemnification within certain parameters.

THE COURT: Okay. I'm not going to rule on that yet. Keep talking.

MR. MELTON: All right. The next argument is that the sales agency agreement was drafted by the ATF defendants who, according to the evidence, had knowledge that the corporate entity was C&C Motor Freight Incorporated and, yet, they have drafted the sales agency agreement in the name of C&C Trucking which is not a legal entity and, therefore, C&C Motor Freight, Incorporated and Robert Darrell Carnley, and Robert Wesley Carnley, who are not signatories to this agreement, are not bound by it. And since ATF has limited its claims for indemnification to the sales agency agreement, there is no claim for indemnification against C&C Motor Freight, Incorporated, Robert Darrell Carnley, and Robert Wesley Carnley, and I'm [494] leaving out Colleen Carnley because she signed it in a personal capacity, and I'm going to talk about her next.

THE COURT: And who have already dismissed as a —

MR. MELTON: With respect to plaintiff's claims, you have dismissed Robert Darrell Carnley and C&C Motor Freight, Incorporated. No, Colleen Carnley, Robert Darrell Carnley and Colleen Carnley with respect to plaintiff's claims.

THE COURT: C&C Trucking, 1202 North Wall Street, Calhoun, Georgia, okay. Response, Mr. Fisher?

MR. FISHER: I think the evidence has shown that C&C Trucking is one of the DBAs of C&C

Motor Freight, Inc., that has been acknowledged, I think, by everybody involved in the – with C&C.

MR. MELTON: Henry Aaron was known as the Hammer, but contracts in the name of the Hammer would not bind Mr. Aaron.

MR. FISHER: And I think also I may be mis-recalling, mis-remembering the testimony, but I believe Ms. Carnley testified that she signed this contract on behalf of herself individually as well as C&C Motor Freight, Inc., but, nevertheless, C&C trucking is a DBA of that entity.

MR. MELTON: This is Contracts 101. You can't bind an entity that's not a legal entity.

THE COURT: So you're asking me to throw the whole [495] thing out?

MR. MELTON: Yes, sir, kit and caboodle.

MR. FISHER: In other words, the indemnification language under the contract is binding on ATF to have waived their indemnification, yet ATF has no indemnification over any of the Carnley defendants under common law. How can ATF be held by what is being alleged to be essentially a unilateral agreement, waive their common law indemnification rights or limit them to those spelled out in the contract that's unenforceable.

THE COURT: If I rule that you have an unenforceable contract, would you then have common law indemnification against a DBA?

MR. FISHER: Not according to Mr. Melton.

THE COURT: I'm not asking him. I'm asking you.

MR. FISHER: Well, yes, absolutely. The contract doesn't affect common law indemnification. That is always there. There is no waiver of that right. This is in addition to any rights that any party might otherwise have.

THE COURT: Well, let me talk to Mr. Kit and Caboodle now. Mr. Melton, I mean I've having trouble seeing how you get it both ways.

MR. MELTON: Judge, if you don't ask you never get it both ways.

THE COURT: Well, I know, but it seems like if you [496] want me to construe this strictly against they who drafted it, which that's what the law commands me to do, then there's an indemnification agreement from some corporate person that doesn't exist, right?

MR. MELTON: Yes.

THE COURT: So if there's no contractual indemnification, then they would have to still have common law indemnity, right?

MR. MELTON: If, Judge, you're asking me to act like the Greeks and pick between Cilia and Charybdis, I would rather have the agreement to be the basis for indemnification than I would common law.

THE COURT: Well, then –

MR. MELTON: So I will take the position that they've waived their common law rights and I'll take my risk with the jury under the indemnification provisions of the sales agency agreement.

THE COURT: I think that's what I'm going to do. I'm going to rule that the contract supersedes any common law remedy, and indemnification will be limited to that which is contained in paragraph eight.

MR. MELTON: That's all I have.

THE COURT: Any other motions?

MR. FISHER: We renew our motion for directed verdict, Your Honor, on behalf of all ATF defendants.

[497] THE COURT: All right. It is – it's denied. Let's see. Let me return this to you, ma'am. Keep it handy. I may need it in a little while. All right. Let's start talking about jury charges. I have to leave relatively soon, so we're not going to get it done today unless y'all just say that everything is fine.

MR. MELTON: Hey, let me make this a little easy. Somebody has got to go first and be easy. I don't object to either one of them. I don't object to plaintiffs and I don't object to ATFs.

THE COURT: All right. You want to go home?

MR. MELTON: No, no.

THE COURT: Because they may object to yours. You didn't submit many but they sure –

MR. MELTON: In the spirit of moving forward.

THE COURT: There aren't many, but they sure are complicated. Let me ask this, how many plaintiff's requests to charge did we get up to?

THE COURT: Forty-one joint venture or –

MR. SHIGLEY: Up to forty-three. The last two or, three of them are in response to the other ones.

THE COURT: That's right. I see forty-three. That's right, in response to their number. Okay. I see it. I see forty-two. That's aggravation.

MR. SHIGLEY: Right.

App. 44

APPENDIX F
SUPREME COURT OF
THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

Date: November 17, 2008

Kenneth L. Shigley
CHAMBERS, AHOLT & RICKARD, LLP
One Midtown Plaza
1360 Peachtree Street, Suite 910
Atlanta, GA 30309

Case No. S08C2066

BRENT DEE JOHNSON v. CLARENDON NATIONAL
INSURANCE COMPANY et al.

COURT OF APPEALS CASE NO. A08A0119

The Supreme Court today denied the petition for
certiorari in this case.

All the Justices concur.

Therese S. Barnes, Clerk

APPENDIX G

SUPREME COURT OF GEORGIA

Case No. S08C2066 Atlanta, December 16, 2008

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

BRENT DEE JOHNSON v. CLARENDON NATIONAL INSURANCE COMPANY et al.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Hunstein, P.J., who dissents.

**SUPREME COURT OF
THE STATE OF GEORGIA**

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Therese S. Barnes, Clerk

APPENDIX H

**IN THE SUPERIOR COURT OF GORDON COUNTY
STATE OF GEORGIA**

BRENT DEE JOHNSON,

Plaintiff

v.

**CLARENDON NATIONAL
INSURANCE COMPANY,
AMERICAN TRANS-FREIGHT
LLC, ATF TRUCKING, LLC, CIVIL ACTION FILE
ATF LOGISTICS, LLC, C & C NO. 04-CV-43532
MOTOR FREIGHT, INC.,
ROBERT WESLEY CARNLEY,
ROBERT DARRELL
CARNLEY and COLLEEN
CARNLEY, d/b/a "C & C
Freight" or "C & C Trucking,"**

Defendants.

**PLAINTIFF'S BRIEF IN OPPOSITION TO
MOTION FOR SUMMARY JUDGMENT BY
DEFENDANTS CLARENDON NATIONAL
INSURANCE COMPANY, AMERICAN
TRANS-FREIGHT LLC, ATF TRUCKING, LLC,
ATF LOGISTICS, LLC**

(Filed Jun. 2, 2006)

Statement of Facts

This case arises from a crash in Gordon County on August 28, 2003, between a pickup truck operated by Brent Johnson and an unmarked carpet truck

with no DOT number displayed hauling carpet from a shipper in Calhoun that was bound for a consignee in California. The carpet truck failed to stop behind a vehicle slowing to turn at an intersection, passed the turning vehicle at the intersection, proceeded through the intersection across the center line, and ripped the driver's side off the pickup truck. Mr. Johnson sustained a serious permanent injury.

That carpet truck, owned and operated by Robert Wesley Carnley (hereinafter "the younger Mr. Carnley"), was hired by Robert Darrell Carnley and Colleen Carnley (hereinafter "the elder Carnleys"), d/b/a C&C Freight or C&C Trucking (hereinafter "C&C"), which operated with no motor carrier authority of its own but only as an agent for American Trans-freight LLC, ATF Trucking, LLC, ATF Logistics, LLC (referred to hereinafter collectively as "ATF").

ATF is an interstate motor carrier that in this case seeks to return to a practice that was outlawed by Congress fifty years ago, by disclaiming responsibility for a truck and driver hauling freight for the company in interstate commerce with no separate motor carrier authority and no compliance with any motor carrier registration or insurance requirements. That truck driver, who chose the CB handle "Alabama Outlaw," claims he is exempt from all state and federal motor carrier laws when transporting an interstate shipment for compensation in a truck with gross vehicle weight over 10,001 pounds.

ATF is comprised of three entities, all of which were parties to an agency contract with the elder Carnleys [Kossayian 9.23-10.19; Exhibit 1]. ATF Trucking, LLC, was a certificated interstate motor carrier [Kossayian 32.15-17]. ATF Logistics, LLC was a freight broker. American Trans-Freight, LLC was a brand identity only that had a logo and web site and handled billing [Kossayian 9.5-20, 12.16-18] ATF has admitted that "any shipment of freight between a consignor in one state and a consignee in another state is an interstate shipment," no matter how the trip is broken up in different legs of a trip [Kossayian 35.20-36.9, 41.7-11]. ATF has further admitted that "any hauling of freight in interstate commerce between a consignor in one state and a consignee in another state must be hauled by a certificated motor carrier, someone with the authority of a certificated motor carrier." [Kossayian 52.2-8]. In addition, ATF has admitted that "the Federal Motor Carrier Safety Regulations have that requirement for the protection and the safety of the motoring public." [Kossayian 52.9-13].

The shipper in Calhoun listed "C&C/ATF" as "carrier" on the freight memorandum [Kossayian, Exhibit 12], and made payment for the freight shipment only to ATF, and ATF is unaware of any payment by the shipper for shipment of the freight to any entity other than ATF [Kossayian 63.2-64.21]. C&C was in turn paid by ATF [Kossayian 64.22-65.3], and the younger Mr. Carnley was paid by C&C out of the

funds paid by the shipper to ATF [R.W. Carnley, 7/30/04, 16.23-17.11].

Robert Wesley Carnley is the son of Robert Darrell Carnley and stepson of Colleen Carnley, the proprietors of C&C Freight or C&C Trucking, and at the time of this collision he lived with them [R.W. Carnley, 7/30/04, 15.15-17]. He is blind in one eye [R.W. Carnley, 7/30/04, 93.21-94.2]. He did not operate under any DOT number [R.W. Carnley, 7/30/04, 22.14-24; R.D. Carnley, 30.1-6], had no motor carrier authority of his own [R.W. Carnley, 1/16/06, 11.12-22], and had his truck tagged for non-commercial use [R.W. Carnley, 7/30/04, 53.5-10] even when being paid to use it to haul carpet under bills of lading for interstate shipment [R.W. Carnley, 7/30/04, 54.20-24].

Hauling interstate shipments for ATF and C&C with no DOT number or motor carrier authority, the younger Mr. Carnley chose the C.B. handle "Alabama Outlaw" [R.W. Carnley, 1/16/06, 15.18-16.1].

The elder Mr. Carnley testified that he had operated C&C with its own motor carrier authority until C&C's insurance premiums went up. At that time, and he was contacted by an ATF representative and entered into a relationship with ATF so that he signed an agency agreement with ATF and began to operate under ATF's motor carrier authority. [R.D. Carnley, 14.22-17.7, 19.8-20, Exhibit 1]. During the time that the younger Mr. Carnley was hauling carpet for ATF, and C&C as agent for ATF, he was not

working for anyone with motor carrier authority other than ATF [R.D. Carnley, 31.5-10]

When he hauled carpet in his truck, the younger Mr. Carnley was dispatched to pick up loads by calls on his cell phone from his step-mother, Colleen Carnley at C&C, the agent for ATF [R.W. Carnley, 7/30/04, 48-50). When ATF paid C&C for freight, C&C paid the younger Mr. Carnley in cash for his hauling carpet from shippers to the warehouse at which ATF loads were consolidated [R.W. Carnley, 7/30/04, 50.17-51.10, 55.30-56.7; R.D. Carnley, 41.11-42.22]. While he primarily hauled carpet for ATF, there was no written lease executed on his truck [R.W. Carnley, 7/30/04, 58.14-15].

At the time of the crash, the carpet truck operated by the younger Mr. Carnley was hauling twenty-two rolls of carpet from Mathews & Parlo in Calhoun, consigned to Big Bob's Carpet in Stockton, California [Kossayian, Exhibit 12; Response of Non-Party Mathews & Parlo to Request for Production of Documents]. After the collision, the load of carpet ultimately made it to Big Bob's in California on a different truck pursuant to the same bill of lading [Kossayian 42.18-44.16]. The gross vehicle weight of the carpet truck driven by the younger Mr. Carnley was 26,000 pounds [R.W. Carnley, 1/16/05, 9.3-5].

ATF contracted with C&C, appointing C&C as an agent for all the ATF entities [Kossayian 44.20-48.2, Exhibit 1]. The elder Mr. Carnley in turn insisted that his son, "Alabama Outlaw," did not need any

motor carrier authority, and was not under any motor carrier laws, when he picked up interstate shipments and take them to his warehouse to be consolidated for ATF [R.D. Caraley, 43.11-45.18, 47.1-48.16].

Clarendon National insurance Company issued an MCS-90 endorsement to ATF Trucking, LLC, which was in effect at the time of this crash [Kossayan 4921-24, Exhibit 50].

Argument and Citation of Authority

A. THE LOAD ON THE CARPET TRUCK AT THE TIME OF THE CRASH, SENT BY A SHIPPER IN GEORGIA TO A CONSIGNEE IN CALIFORNIA, WAS AN INTERSTATE SHIPMENT EVEN DURING THE INITIAL LEG OF THE TRIP WITHIN GEORGIA.

For at least ninety-three years, it has been the clear law of the land that a single shipment, having one origin and one destination, cannot at the same time be both an intrastate shipment and an interstate shipment, as the test to determine whether goods are moving in intrastate or interstate transit focuses on the "essential character" of the shipment. *Texas & N.O.R. Co. v. Sabine Tram Co.*, 227 U.S. 111, 122, 33 S.Ct. 229, 233, 57 L.Ed. 442, 447 (1913). For over half a century Georgia courts in motor carrier cases have recognized that where a shipment originates in one state and is destined for a consignee in another state, the shipment is "interstate" in character from beginning to end. *Atlanta-Asheville Motor Exp. v. Superior Garment Mfg. Co.*, 82 Ga.App. 812,

62 S.E.2d 376 (1950); *American Fidelity & Cas. Co. v. Thompson*, 74 Ga.App. 189, 39 S.E.2d 443 (1946). The intent at the time transportation commences – such as the shipper's intent in the case to ship carpet from Georgia to California – “fixes the character of the shipment for all the legs of the transport within the United States.” *Project Hope v. M/V Ibn Sina*, 250 F.3d 67, 75 (2d Cir.2001). See also, *Bilyou v. Dutchess Beer Distributors, Inc.*, 300 F.3d 217 (2d Cir. 2002); *Klitzke v. Steiner Corp.*, 110 F.3d 1465, 1469 (9th Cir.1997); *Pittsburgh-Johnstown-Altoona Express, Inc.*, MC-C-30129, (I.C.C. Slip, February 6, 1990); *Middlewest Motor Freight Bureau v. I.C.C.*, 867 F.2d 458, 460-61 (8th Cir.), *cert. denied*, *Missouri Div. of Transp. v. I.C.C.*, 493 U.S. 890, 110 S.Ct. 234, 107 L.Ed.2d 185 (1989); *Texas v. United States*, 866 F.2d 1546, 1556 (5th Cir.), *reh. denied*, 874 F.2d 812 (5th Cir. 1989).

Transportation of goods within a single state may be deemed “interstate” in character when it forms part of a “practical continuity of movement” across state lines from the point of origin to the final destination. *Johnsen v. Allsup's Convenience Stores, Inc.*, 119 N.M. 245, 889 P.2d 853, 857 (1995) (citing *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 568, 63 S.Ct. 332, 335, 87 L.Ed. 460 (1943)). The interstate versus intrastate determination hinges upon an assessment of the essential character of the commerce, manifested by the shipper's fixed and persisting intent at the time of the shipment, and ascertained from all of the circumstances attending the transportation.

See *United States v. Erie R.R. Co.*, 280 U.S. 98, 102, 50 S.Ct. 51, 53, 74 L.Ed. 187 (1929).

In a substantial line of decisions, courts and regulators have considered whether two phases of transportation, one which crosses state borders and another that does not, should be regarded as a single, interstate venture, and have held that a mere pause in transit within the state of origin does not change the interstate nature of the shipment. See, e.g., *Champlain Realty Co. v. Town of Brattleboro, Vt.*, 260 U.S. 366, 43 S.Ct. 146, 67 L.Ed. 309 (1922); *Texas & N.O.R. Co. v. Sabine Tram Co.*, 227 U.S. 111, 33 S.Ct. 229 (1913); *Ohio RR. Com'n v. Worthington*, 225 U.S. 101, 32 S.Ct. 653, 56 L.Ed. 1004 (1912).

Therefore, where the hauling of goods between two points in the same state is "part of the interstate movement of goods" if the carriage was "merely one leg of a route to an out-of-state destination." *Bilyou v. Dutchess Beer Distributors*, 300 F.3d 217, 224 (2d Cir.2002); *Foxworthy v. Hiland Dairy Co.*, 997 F.2d 670, 672 (10th Cir.1993); *Reich v. American Driver Serv., Inc.*, 33 F.3d 1153, 1155 n. 3 (9th Cir.1994).

In this case, it is undisputed that the shipment originated with a shipper in Calhoun, Georgia, bound for a consignee in California. Thus, it was an interstate shipment from the time the load was picked up at the shipper's location in Calhoun.

B. THE CARPET TRUCK INVOLVED IN THIS CRASH HAD A GROSS VEHICLE WEIGHT OVER 10,001 POUNDS, WAS TRANSPORTING PROPERTY IN INTERSTATE COMMERCE AND THEREFORE WAS A COMMERCIAL MOTOR VEHICLE GOVERNED BY THE FEDERAL MOTOR CARRIER SAFETY REGULATIONS.

The Federal Motor Carrier Safety Regulations "are applicable to all employers, employees, and commercial motor vehicles, which transport property or passengers in interstate commerce." 49 C.F.R. § 390.3(a). Pertinent to the facts of this case, "commercial motor vehicle" is defined to mean "any self-propelled or towed motor vehicle used on a highway in interstate commerce to transport passengers or property when the vehicle" weighs 10,001 pounds or more." 49 C.F.R. § 390.5. The carpet truck operated by the younger Mr. Carnley had a gross vehicle weight of 26,000, well over the threshold.

C. THERE ARE GENUINE ISSUES OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT REGARDING THE LIABILITY OF ATF FOR NEGLIGENT SELECTION OF AN INCOMPETENT CONTRACTOR.

Even if the younger Mr. Carnley could be considered an independent contractor rather than a statutory employee of ATF in relationship to an injured member of the traveling public, a motor carrier may be held liable for negligent hiring of an incompetent independent contractor that fails to comply with registration and insurance requirements for motor

carriers transporting property in interstate commerce. *Puckrein v. ATI Transport, Inc.*, ___ A. 2d. ___, 2006 WL 1389593 (N.J. 2006).

In *Schramm v. Foster*, 341 F.Supp.2d 536, Fed. Carr. Cas. P 84,364 (D. Md. 2004), genuine issues of material precluded summary judgment for a freight broker on negligent hiring claims, even though the broker was not acting as a motor carrier, where a logistics broker failed to consider a motor carrier's bad safety record.

There are three exceptions to the general rule that principals are not liable for the actions of independent contractors, one of which is where the principal engages an incompetent contractor. *Restatement (Second) of Torts* § 411 (1965). Comment a to *Restatement* § 411, in turn, defines a competent and careful contractor as "a contractor who possesses the knowledge, skill, experience, and available equipment which a reasonable man would realize that a contractor must have in order to do the work which he is employed to do without creating reasonable risk of injury to others." In a trucking case, licensing, registration, and insurance are essential to lawful transport of goods on the roadways.

"An employer may be charged with negligence in hiring an independent contractor where it is demonstrated that he should have known, or might by the exercise of reasonable care have ascertained, that the contractor was not competent." Reuben I. Friedman, Annotation, *When is Employer Chargeable with*

Negligence in Hiring Careless, Reckless, or Incompetent Independent Contractor, 78 A.L.R. 3d 910, 916 (1977); see also J.D. Lee & Barry A. Lyndahl, *Modern Tort Law* § 8.03 (1991) ("An employer may be liable for the negligent acts of an independent contractor if the employer fails to exercise due care in the selection of a competent independent contractor."); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 71 (5th ed.1984).

As the court held in *Puckrein, supra*, a company whose core purpose is the transportation of property on the highways has a duty to use reasonable care in the hiring of an independent trucker including a duty to make an inquiry into that trucker's ability to travel legally on the highways. At a minimum, ATF was required to inquire whether its haulers had proper insurance and registration because without those items the hauler had no right to be on the road. Just as ATF itself could not have transported products in unregistered and underinsured trucks, it was not free to engage an independent contractor that did so.

Even the *Schramm* case, however, did not involve an interstate motor carrier using the services of an individual who had no form of motor carrier authority either intrastate nor interstate, failed to comply with the insurance requirements for interstate motor carriers, and denied being subject to any form of motor carrier regulation while transporting an interstate shipment in a truck that was a commercial motor vehicle under the FMCSR. If failure to check a motor carrier's safety record presents a genuine issue

of material fact on a claim of negligent hiring of an independent contractor, the use of an "Alabama Outlaw" who defies the applicability of all motor carrier laws surely does.

D. NOTWITHSTANDING THE OMISSION OF A WRITTEN LEASE THAT WAS REQUIRED BY FEDERAL LAW, THE YOUNGER MR. CARNLEY WAS A STATUTORY EMPLOYEE OF ATF IN THIS TRANSACTION.

During the first half of the twentieth-century, interstate motor carriers – like ATF in this case – attempted to immunize themselves from liability for negligent drivers by hiring inadequately insured, risky trucks and their drivers – like C&C and the Carnleys in this case. The companies would classify the drivers who operated the trucks as "independent contractors," and disclaim any association when those uninsured trucks and drivers caused injury to the general public. See, e.g., *White v. Excalibur Insurance Company*, 599 F.2d 50, 52 (5th Cir.1979); *Morris v. JTM Materials, Inc.*, 78 S.W.3d 28, 37 (Tex.App. – Fort Worth 2002).

To address this problem, Congress amended the Motor Common Carrier Act in 1956 to require that a motor carrier assume "full direction and control" of leased vehicles in order to prevent trucking companies from eluding liability by engaging in such evasive "independent contractor" relationships. The federal and state filing requirements were designed to provide a minimal form of coverage for the general

public when insolvent and uninsured actors injured them. See *White*, 599 F.2d at 53 ("Congress wished to impose on lessee-carriers responsibility for the operation of leased vehicles 'as if they were the owners of such vehicles.'") (citing 49 U.S.C. § 304(e)(2), now codified at 49 U.S.C. § 11107(a)(4)). "Because the carrier now has both a legal right and duty to control vehicles operated for its benefit, the employees of the vehicle-lessor are deemed statutory employees of the lessee-carrier to the extent necessary to insure the carrier's responsibility for the public safety just as if the lessee-carrier were the owner of the vehicles." *Id.* (citing *Simmons v. King*, 478 F.2d 857, 867 (5th Cir.1973)).

As a result of the regulatory authority granted in the Act, Federal Motor Carrier Safety Regulations require a certificated interstate carrier who leases equipment to enter into a written lease with the equipment owner providing that the carrier-lessee shall have exclusive possession, control, and use of the equipment, and shall assume complete responsibility for the operation of the equipment, for the duration of the lease. 49 C.F.R. §§ 376.11-12. This FMCSR was enacted to protect the public by providing it with financially responsible carriers, *Indiana Refrigerator Lines, Inc. v. Dalton*, 516 F.2d 795, 796 (6th Cir.1975), and by preventing a carrier from "evad[ing] its responsibility to the public by obtaining its trucks through leasing arrangements rather than ownership and employment of drivers." *Toomer v.*

United Resin Adhesives, Inc., 652 F.Supp. 219, 229 (N.D.Ill.,1986).

The FMCSR requires a carrier lessee to execute a written lease, to clearly identify the vehicle as in the employ of the carrier, and to observe other formalities evidencing its control over the vehicle and its responsibility for its actions, including displaying the carrier's placard. 49 C.F.R. § 1057.11(a)-(d). The majority of authorities concerning such cases involving the liability of carrier-lessees holds that when a carrier-lessee permits a lessor-driver to use its authority without compliance with Federal Motor Carrier Safety regulations, it is responsible for injuries caused by the lessor-driver, even if the lessor-driver was embarked on an undertaking of his own while using the carrier-lessee's authority. *Rodriguez v. Ager*, 705 F.2d 1229 (10th Cir., 1983); *Carolina Cas. Ins. Co. v. Insurance Co. of North America*, 595 F.2d 128 (3rd Cir., 1979); *Wellman v. Liberty Mut. Ins. Co.* 496 F.2d 131 (8th Cir., 1974); *Rediehs Express, Inc. v. Maple*, 491 N.E.2d 1006 (Ind.App.,1986), *Kreider Truck Service, Inc. v. Augustine*, 76 Ill.2d 535, 311 Ill.Dec. 802, 394 N.E.2d 1179 (1979); *Cox v. Bond Transp., Inc.*, 53 N.J. 186, 249 A.2d 579 (1969).

Where a commercial motor vehicle carries an interstate shipment for an interstate motor carrier without complying with any of the substantive or procedural formalities, a lease may be implied to hold a motor carrier insurer responsible for personal injury claims under its liability insurance. The public policy behind 49 C.F.R. § 1057 would be wrongfully

frustrated if the court allowed a motor carrier to use the services of an owner operator without complying with lease requirements "to evade the liability imposed upon it by asserting that a written trip lease was a condition precedent to any contract between the parties." *Wilson v. Riley Whittle, Inc.*, 145 Ariz. 317, 321, 701 P.2d 575 (Ct.App.1985) ("the absence of a written trip lease is legally irrelevant"). See also, *Zamalloa v. Hart*, 31 F.3d 911 (9th Cir., 1994); *Northland Ins. Co. v. Bennett*, 533 N.W.2d 867 (Minn.App.,1995); *Fuller v. Riedel*, 159 Wis.2d 323, 464 N.W.2d 97 (Ct.App.1990) (finding statutorily liable a carrier lessee who entered into an oral trip lease and whose sign was not displayed at the time of the accident); *Cox v. Bond Transportation, Inc.*, 53 N.J. 186, 249 A.2d 579 (carrier lessee statutorily liable under an oral lease for an accident that occurred while the driver was on his way home), *cert. denied*, 395 U.S. 935, 89 S.Ct. 1999, 23 L.Ed.2d 450 (1969).

In this case, the written lease required by the FMCSR was omitted only because ATF – through its agent C&C, which operated solely under the motor carrier authority of ATF – chose to hire the services of a truck and driver that had no motor carrier authority other than that of ATF, without the formality of a written lease. ATF cannot escape statutory employer liability simply because it chose, through its agent, to evade the FMCSR requirement of a written lease by contracting with a truck and driver that did not have

any motor carrier authorization and did not comply with interstate motor carrier insurance requirements.

Conclusory labeling of the younger Mr. Carnley as an "independent contractor" can have no legal effect on ATF's liability to Mr. Johnson as a member of the traveling public injured by Mr. Carnley while hauling a shipment in interstate commerce for ATF "The effort of the carrier and the vehicle lessor to create by contract an independent contractor relationship cannot operate to frustrate the federal design to impose responsibility on the carrier for acts of those who might otherwise be independent contractors." See *White*, 599 F.2d at 54. "Where members of the public are injured by the torts of the drivers of leased vehicles, the traditional common law doctrine of master-servant relationships and respondeat superior does not apply." *Judy v. Tri-State Motor Transit Co.*, 844 F.2d 1496, 1051 (11th Cir.1988).

"The simple fact of the matter is that Congress intended that . . . [a motor] carrier be the insurer of [its leased tractor trailer drivers] with respect to the general public." *Radman v. Jones Motor Co., Inc.*, 914 F.Supp. 1193, 1198 (W.D.Pa.1996).

Defendants misplace their reliance upon *Stanley v. Fiber Transport, Inc.*, 221 Ga.App. 171, 470 S.E.2d 767 (1996). That case is inapposite for because Judge Banke's analysis turns upon the facts that the truck in that case was hauling wood bark, a commodity expressly exempted from the Federal Motor Carrier Safety Regulations. Change that fact, remove the

exemption – as in the case at bar – and the outcome would be changed. First, the truck in *Stanley* hauled wood bark only for one customer. Wood bark was listed as an exempt commodity under 49 USC § 10521(a)(1) and 49 USC § 10526(a)(6)(C). Due to that express exemption, the Federal Motor Carrier Safety Regulations did not apply. There is no exempt commodity involved in this case. Second, in *Stanley* the only basis for imputed liability was whether or not a lease existed; there was no question of agency. Second, in *Stanley*, Fiber had a contract with its only customer to transport pine bark, but when it was unable to fulfill part of its contractual obligation to deliver pine bark to South Carolina, Wood Chip agreed to transport the material for a stipulated sum, and then an employee of Wood Chip called a scale operator at a local mill and left word that any available trucker could pick up the bark. In response to this offer, three trailers belonging to D & D Trucking, owned by Davis, were loaded. One of those was involved in a collision. The job of hauling an exempt commodity was thus farmed out to whoever was available, and an unrelated trucker two layers removed from Fiber Transport had a wreck. A critical issue the court noted was the exemption of wood chip hauling from federal motor carrier regulations, so that federal regulations governing imputation of liability to a statutory employer were not applicable, and there was no express contract under which Fiber Transport would be liable for the driver's actions under Georgia law. This case does not involve an exempt commodity, so there is no exemption from

Federal Motor Carrier Safety Regulations, and the analysis in *Stanley* is inapplicable.

E. ATF FUNCTIONED AS A MOTOR CARRIER RATHER THAN AS A FREIGHT BROKER WITH REGARD TO THE SHIPMENT IN THIS CASE.

ATF has both motor carrier and freight broker entities, both of which are parties to the agency contract with C&C. A transportation entity may have authority to operate as both a broker and a carrier. *Global Van Lines, Inc. v. I.C.C.*, 691 F.2d 773, 774 (5th Cir.1982). The focus of the court's inquiry must be on ATF's role in the specific transaction with Carnley and the nature of the relationship between Carnley, C&C, and ATF. See *Custom Cartage, Inc. v. Motorola, Inc.*, 1999 WL 965686, *9 (N.D.Ill.1999); *Phoenix Assur. Co. v. Kmart Corp.*, 977 F.Supp. 319, 326 (D.N.J.1997) (registration as a broker and failure to register as a carrier are not dispositive of entity's true identity). A "motor carrier" is defined in 49 U.S.C. § 13102(12) as "a person providing motor vehicle transportation for compensation." The regulatory definition of "employee" in 49 C.F.R. § 390.5 encompasses independent contractors hired by motor carriers to transport freight. 49 C.F.R. § 371.2(a) distinguishes motor carriers from brokers: "Motor carriers, or persons who are employees or bona fide agents of carriers, are not brokers within the meaning of this section when they arrange or offer to arrange the transportation of shipments which they

are authorized to transport and which they have accepted and legally bound themselves to transport."

It is undisputed that neither C&C nor the younger Mr. Carnley had any legal authority whatsoever to operate as motor carriers apart from the authority of ATF. Thus, ATF, C&C and the younger Mr. Carnley were functioning in the capacity of a motor carrier, in that C&C, as the authorized agent of ATF, and through its hiring of the younger Mr. Carnley and his truck with no separate motor carrier authority, accepted responsibility to transport an interstate shipment at the shipper's location in Calhoun, Georgia.

Plaintiff does not contend that the shipper's listing of ATF as "carrier" on the freight memorandum is conclusive as to ATF's carrier status in the transaction. However, that fact may be considered along with the ongoing relationship between the shipper and ATF, the fact that there is no evidence that the shipper paid separately for Carnley's leg of the interstate shipment, and the fact that neither C&C nor the younger Mr. Carnley had any motor carrier authority apart from ATF. The combination of these facts does support a genuine issue of material fact as to ATF's status as a motor carrier with regard to this specific transaction, and thus preclude summary judgment.

F. THE MCS-90 ENDORSEMENT OF THE CLARENDON INSURANCE POLICY PROVIDES COVERAGE FOR PROTECTION OF MEMBERS OF THE TRAVELING PUBLIC.

For motor carriers subject to federal regulation, insurers must cause insurance policies to be endorsed for public liability. The most common form of such endorsement is the MCS-90, which amends the insurance policy to fill coverage gaps and to assure compliance with the Motor Carrier Act and FMCSR. It remains in effect continuously until replaced or cancelled according to special cancellation requirements independent of the policy's cancellation requirements. It is considered public information, and registered motor carriers must keep it available to the public for inspection. 49 C.F.R. § 387.7(e), 49 C.F.R. § 387.29; 49 C.F.R. § 387.7(b)(1); 49 C.F.R. § 387.31(b)(1).

The purpose of the Federal Motor Carrier Act ("FMCA"), and the regulations promulgated pursuant thereto, especially the MCS-90, was to stem the unregulated use of vehicles in interstate commerce, which threatened public safety. *Integral Insurance Company v. Lawrence Fulbright Trucking*, 930 F.2d 258 (2d Cir.1991). One of the "significant aims" of federal rules regulating motor carriers is to eliminate "attendant difficulties" of fixing financial responsibility for damage and injuries to members of the public. *Transamerican Freight Lines v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28, 37, 96 S.Ct. 229, 46 L.Ed.2d 169 (1975). Accordingly, the MCS-90 should

be construed and applied to protect members of the public injured by interstate motor carriers from uncompensated losses – by mandating coverage where there would otherwise be no coverage). *American Alternative Ins. Co. v. Sentry Select Ins. Co.*, 176 F.Supp.2d 550 (E.D.Va.,2001). “A motor carrier of property has a duty under federal law to guaranty its financial responsibility for injuries to the public. Purchasing coverage under an MCS-90 endorsement is one way for a carrier to fulfill this duty.” *Harco National Insurance Company v. Bobac Trucking et al*, 1995 WL 482330 at *4 (N.D.Ca.1995); *Barbarula ex rel. Estate of He v. Canal Ins. Co.*, 353 F.Supp.2d 246 (D.Conn.,2004).

The Motor Carrier Act is a highly remedial statute and its terms are broadly comprehensive enough to bring within them all of those who, no matter what form they use, are in substance engaged in the business of transportation of property on the public highways for hire. *Georgia Truck System v. ICC*, 123 F.2d 210, 211 (5th Cir.1941). The Act being a remedial statute, it should be liberally interpreted to effect its evident purpose. *McDonald v. Thompson*, 305 U.S. 263, 265, 59 S.Ct. 176, 83 L.Ed. 164 (1938) and *Piedmont and N. Ry. Co. v. I.C.C.*, 286 U.S. 299, 311, 52 S.Ct. 541, 76 L.Ed. 1115 (1932) (“The Transportation Act was remedial legislation, and should therefore be given a liberal interpretation. . . .”).

The MCS-90 is not insurance coverage per se, but operates as a suretyship for the benefit of the public resting on top of the motor carrier’s liability policy.

See, e.g., *Canal Ins. Co. v. Carolina Cas. Ins. Co.*, 59 F.3d 281, 283 (1st Cir. 1995); *John Deere Ins. Co. v. Truckin' U.S.A.*, 122 F.3d 270, 274 (5th Cir. 1997). It does not create in the insurer a duty to defend, but only a duty to member of the public pay any judgment against the motor carrier resulting from negligence in operation, maintenance or use of motor vehicles even if not specifically listed on the policy. See, e.g., *Canal Ins. Co. v. First Gen. Ins. Co.*, 889 F.2d 604, 614 (5th Cir. 1989); *Industrial indem. Co. v. Truax Truck Lines, Inc.*, 45 F.3d 986, 991 (5th Cir. 1995); *National Am. Ins. Co. v. Century State Carriers, Inc.*, 785 F.Supp. 793, 795 (N.D. Ind. 1992). The MCS-90 overrides policy exclusions that would otherwise defeat coverage, including non-cooperation and notice clauses. *Campbell v. Bartlett*, 975 F.2d 1569, 1580-81 (10th Cir. 1992).

Defendant Clarendon relies upon *Spicer v. American Home Assur Co.*, 292 F.Supp. 27 (N.D. Ga. 1967). In that case, after a default judgment against a truck driver only, the plaintiff filed a direct action against an insurer that had filed for protection of the public pursuant to state law in Georgia. The court concluded that under Georgia law, "It is apparent then that all three parties – the driver, the carrier, and the insurance company – may be joined and the inference is clear that any one of such parties may be sued alone and thereby bind the company for payment of the eventual judgment as is the case here." Rejecting all the insurance company's spurious arguments, the court held for the injured plaintiff. Insofar as *Spicer*

is relevant at all, it supports the plaintiff in this case. It does not, however, even discuss Federal Motor Carrier Safety Regulations, the statutory employer doctrine, negligent hiring of an incompetent contractor, or the MCS-90 endorsement required under federal law, all of which provide further support for the Plaintiff's position.

Therefore, there are genuine issues of material fact regarding Clarendon's liability under the MCS-90 endorsement for the liability of the other defendants' motor carrier operation negligence, and no ground asserted by Clarendon in the motion for summary judgment requires entry of judgment as a matter of law.

WHEREFORE, Plaintiff shows that there are genuine issues of material fact precluding summary judgment with regard to the liability of ATF Trucking, LLC on theories of responsibility for a statutory employee, respondeat superior for the negligence of its agents, and negligent hiring of an incompetent contractor; the liability of ATF Logistics, LLC., for the negligent hiring of an incompetent contractor; the liability of American Trans-Freight, LLC under theories of respondeat superior, agency, statutory employee and negligent hiring of an incompetent contractor, and the liability of Clarendon under the MCS-90 endorsement.

App. 69

This the 30th day of May, 2006.

Respectfully submitted,

/s/ Kenneth L. Shigley
KENNETH L. SHIGLEY
Georgia Bar No. 642744
Attorney for Plaintiff

SHIGLEY LAW FIRM, LLC
3166 Mathieson Drive, NE, Suite 200
Atlanta, Georgia 30305-1826
Tel: (404) 364-1999
Fax: (404) 364-0880
E-mail: ken@shigleylaw.com

/s/ Thomas L. Maddox (by KLS)
THOMAS L. MADDUX
(with expressed permission)
Georgia Bar No. 465514
Attorney for Plaintiff

LAW OFFICE OF TOMMY LEE MADDUX
201 Bombay Lane
Roswell, Georgia 30076
Tel: (678) 762-1632
Fax: (770) 641-6003
E-mail: tommy@tlmaddox.com

App. 70

IN THE SUPERIOR COURT OF GORDON COUNTY
STATE OF GEORGIA

BRENT DEE JOHNSON,

Plaintiff

v.

CLARENDON NATIONAL
INSURANCE COMPANY,
AMERICAN TRANS-FREIGHT
LLC, ATF TRUCKING, LLC, CIVIL ACTION FILE
ATF LOGISTICS, LLC, C & C NO. 04-CV-43532
MOTOR FREIGHT, INC.,
ROBERT WESLEY CARNLEY,
ROBERT DARRELL
CARNLEY and COLLEEN
CARNLEY, d/b/a "C & C
Freight" or "C & C Trucking,"

Defendants.

**PLAINTIFF'S CONCISE STATEMENT OF
MATERIAL FACTS AS TO WHICH THERE
EXISTS A GENUINE ISSUE TO BE TRIED**

(Filed Jun. 2, 2006)

- A. ATF is comprised of three entities, all of which were parties to an agency contract with the elder Carnleys [Kossayan 923-10.19; Exhibit 1].
- B. ATF Trucking, LLC, was a certificated interstate motor carrier [Kossayan 32.15-17].
- C. ATF Logistics, LLC was a freight broker. American Trans-Freight, LLC was a brand identity

only that had a logo and web site and handled billing [Kossayian 9.5-20, 12.16-18].

- D. ATF has admitted that "any shipment of freight between a consignor in one state and a consignee in another state is an interstate shipment," no matter how the trip is broken up in different legs of a trip [Kossayian 35.20-36.9, 41.7-11].
- E. ATF has admitted that "any hauling of freight in interstate commerce between a consignor in one state and a consignee in another state must be hauled by a certificated motor carrier, someone with the authority of a certified motor carrier." [Kossayian 52.2-8].
- F. ATF has admitted that "the Federal Motor Carrier Safety Regulations have that requirement for the protection and the safety of the motoring public" [Kossayian 52.9-13].
- G. The shipper listed "C&C/ATF" as "carrier" on the freight memorandum [Kossayian, Exhibit 12], and made payment for the freight shipment only to ATF, and ATF is unaware of any payment by the shipper for shipment of the freight to any entity other than ATF [Kossayian 63.2-64.21]
- H. C&C was in turn paid by ATF [Kossayian 64.22-65.3], and the younger Mr. Carnley was paid by C&C out of the funds paid by the shipper to ATF [R.W. Carnley, 7/30/04, 16.23-17.11].
- I. Robert Wesley Carnley is the son of Robert Darrell Carnley and stepson of Colleen Carnley, the proprietors of C&C Freight or C&C Trucking, and at the time of this collision, he lived with them [R.W. Carnley, 7/30/04, 15.15-17].

- J. He is blind in one eye [R.W. Carnley, 7/30/04, 93.21-94.2].
- K. He did not operate under any DOT number [R.W. Carnley, 7/30/04, 22.14-24; R.D. Carnley, 30.1-6], had no motor carrier authority of his own [R.W. Carnley, 1/16/06, 11.12-22], and had his truck tagged for non-commercial use [R.W. Carnley, 7/30/04, 53.5-10] even when being paid to use it to haul carpet under bills of lading for interstate shipment [R.W. Carnley, 7/30/04, 54.20-24].
- L. Hauling interstate shipments for ATF and C&C with no DOT number or motor carrier authority, the younger Mr. Carnley chose the C.B. handle "Alabama Outlaw" [R.W. Carnley, 1/16/06, 15.18-16.1].
- M. The elder Mr. Carnley testified that he had operated C&C with its own motor carrier authority until its insurance premiums went up, when he was contacted by an ATF representative and entered into a relationship with ATF so that he signed an agency agreement with ATF and began to operate under ATF's motor carrier authority. [R.D. Carnley, 14.22-17.7, 19.8-20, Exhibit 1].
- N. During the time that the younger Mr. Carnley was hauling carpet for ATF, and C&C as agent for ATF, he was not working for anyone with motor carrier authority other than ATF [R.D. Carnley, 31.5-10].
- O. When he hauled carpet in his truck, he was dispatched to pick up loads by calls on his cell phone from his step-mother, Colleen Carnley at

C&C, the agent for ATF. [R.W. Carnley, 7/30/04, 48-50]

- P. When ATF paid C&C for freight, C&C paid the younger Mr. Carnley in cash for his hauling carpet from shippers to the warehouse at which ATF loads were consolidated [R.W. Carnley, 7/30/04, 50.17-51.10, 55.30-56.7; R.D. Carnley, 41.11-42.22].
- Q. While he primarily hauled carpet for ATF, there was no written lease executed on his truck [R.W. Carnley, 7/30/04, 58.14-15].
- R. At the time of the crash, the carpet truck operated by the younger Mr. Carnley was hauling twenty-two rolls of carpet from Mathews & Parlo in Calhoun, consigned to Big Bob's Carpet in Stockton, California [Kossayian, Exhibit 12; Response of Non-Party Mathews & Parlo to Request for Production of Documents].
- S. After the collision, the load of carpet ultimately made it to Big Bob's in California on a different truck pursuant to the same bill of lading [Kossayian 42.18-44.16].
- T. The gross vehicle weight of the carpet truck driven by the younger Mr. Carnley was 26,000 pounds [R.W. Carnley, 1/16/05, 9.3-5].
- U. ATF contracted with C&C, appointing C&C as an agent for all the ATF entities [Kossayian 44.20-48.2, Exhibit 1].
- V. The elder Mr. Carnley insisted that his son, "Alabama Outlaw," did not need any motor carrier authority, and was not under any motor carrier laws, when he picked up interstate shipments

and took them to his warehouse to be consolidated for ATF [R.D. Carnley, 43.11-45.18, 47.1-48.16].

- W. Clarendon National Insurance Company issued an MCS-90 endorsement to ATF Trucking, LLC, which was in effect at the time of this crash [Kos-sayian 49.21-24, Exhibit 50].

This the 30th day of May, 2006.

Respectfully submitted,

/s/ Kenneth L. Shigley
KENNETH L. SHIGLEY
Georgia Bar No. 642744
Attorney for Plaintiff

SHIGLEY LAW FIRM, LLC
3166 Mathieson Drive, NE, Suite 200
Atlanta, Georgia 30305-1826
Tel: (404) 364-1999
Fax: (404) 364-0880
E-mail: ken@shigleylaw.com

/s/ Thomas L. Maddox (by KLS)
THOMAS L. MADDOX
(with expressed permission)
Georgia Bar No. 465514
Attorney for Plaintiff

LAW OFFICE OF TOMMY LEE MADDOX
201 Bombay Lane
Roswell, Georgia 30076
Tel: (678) 762-1632
Fax: (770) 641-6003
E-mail: tommy@tlmaddox.com

APPENDIX I

**IN THE SUPERIOR COURT OF GORDON COUNTY
STATE OF GEORGIA**

BRENT DEE JOHNSON,

Plaintiff

v.

**CLARENDON NATIONAL
INSURANCE COMPANY,
AMERICAN TRANS-
FREIGHT LLC, ATF
TRUCKING, LLC, ATF
LOGISTICS, LLC, C & C
MOTOR FREIGHT, INC.,
ROBERT WESLEY
CARNLEY, ROBERT DAR-
RELL CARNLEY and COL-
LEEN CARNLEY, d/b/a
"C & C Freight" or "C & C
Trucking,"**

**CIVIL ACTION FILE
NO. 04-CV-43532**

Defendants.

PLAINTIFF'S TRIAL MEMORANDUM

The ATF and Clarendon defendants seek to avoid financial responsibility for an interstate shipment carried under ATF's motor carrier authority by disowning the driver hauling their load, and by trying to pass the buck to another carrier that was called three days after the wreck to carry a consolidated shipment to final destinations in California.

By adopting this position, the ATF and Clarendon Defendants are asking the Court to disregard a half-century of targeted legislation and bedrock jurisprudence squarely addressing the issues. In effect, the ATF Defendants want the court to roll back the clock more than fifty (50) years in an effort to avoid exactly the types of abuses that the law on the subject was designed to eliminate, "but the crushing weight of authority"¹ runs directly contrary to the ATF Defendants' disingenuous approach, in that at least 98 courts² considering the issues from 1941-2006, in at

¹ *Harvey v. F-B Truck Lines Co.*, 767 F.2d 254 (Idaho 1987).

² *Georgia Truck System, Inc. v. Interstate Commerce Commission*, 123 F.2d 210 (5th Cir. 1941); *Taylor v. Oakland Scavenger Co.*, 100 P.2d 1044 (Cal. 1941); *Venuto v. Robinson*, 118 F.2d 679 (3rd Cir. 1941); *A.W. Stickle & Co. v. Interstate Commerce Commission*, 128 F.2d 155 (10th Cir. 1942); *Binkley Mining Co., Inc. v. Wheeler*, 133 F.2d 863 (8th Cir. 1943); *Hodges v. Johnson*, 52 F.Supp. 488 (W.D. Va. 1943); *U.S. v. Mut. Truck Co.*, 141 F.2d 655 (6th Cir. 1944); *Brinker v. Koenig Coal & Supply Co.*, 20 N.W.2d 301 (Mich. 1945); *Barry v. Keeler*, 76 N.E.2d 158 (Mass. 1947); *Kemp v. Creston Transfer Co.*, 70 F. Supp. 521 (N.D. Iowa 1947); *Brown v. L.H. Bottoms Truck Lines, Inc.*, 42 S.E.2d 71 (N.C. 1947); *War Emergency Co-Op Assn. v. Widenhouse*, 169 F.2d 403 (4th Cir. 1948); *Carter v. E.T. & W.N.C. Transp. Co., Inc.*, 243 S.W.2d 505 (Tenn. Ct. App. 1950); *Marriott v. National Mut. Cas. Co.*, 195 F.2d 462 (10th Cir. 1952); *Trautman v. Higbie*, 89 A.2d 649 (N.J. 1952); *American Trucking Ass'ns v. United States*, 344 U.S. 298 (1953); *Snyder v. Southern California Edison Co.*, 285 P.2d 912 (Cal. 1955); *Christian v. U.S.*, 152 F. Supp. 561 (D. Md. 1957); *American Transit Lines v. Smith*, 246 F.2d 86 (6th Cir. 1957); *Baumgartner v. Burt*, 365 P.2d 681 (Colo. 1961); *Interstate Commerce Commission v. Dudgeon*, 213 F.Supp. 710 (S.D. Cal. 1961); *Payne v. King's Van & Storage, Inc.*, 367 P.2d 173 (Okla. 1961). *Mellon Nat'l. Bank & Trust Co.*

(Continued on following page)

App. 77

v. Sophie Lines, Inc., 289 F.2d 473 (3rd Cir. 1961); *National Trailer Convoy, Inc. v. Saul*, 375 P.2d 922 (Okla. 1962); *Interstate Commerce Commission v. Interstate Auto Shippers, Inc.*, 214 F.Supp. 473 (S.D.N.Y. 1963); *Gackstetter v. Dart Transit Co.*, 130 N.W.2d 326 (Minn. 1964); *Agricultural Transportation Assoc. of Texas v. King*, 349 F.2d 873 (5th Cir. 1965); *Wirtz v. Dependable Trucking Co.*, 260 F.Supp. 240 (D.N.J. 1966); *Maloney v. Rath*, 445 P.2d 513 (Cal. 1968); *Braden v. Turner*, 284 F.Supp. 379 (E.D. Tenn. 1968); *Cox v. Bond Trans., Inc.*, 53 N.J. 186, 249 A.2d 579 (N.J. 1969), *cert. denied* 395 U.S. 935 (1969); *Alford v. Major*, 470 F.2d 132 (7th Cir. 1972); *Cosmopolitan Mut. Ins. Co. v. White*, 336 F.Supp. 92 (D.Del. 1972); *Simmons v. King*, 478 F.2d 857 (5th Cir. 1973); *Wellman v. Liberty Mut. Ins. Co.*, 496 F.2d 131 (8th Cir. 1974); *Proctor v. Colonial Refrigerated Transp., Inc.*, 494 F.2d 89 (4th Cir. 1974); *Indiana Refrigerator Lines, Inc. v. Dalton*, 516 F.2d 795 (6th Cir. 1975); *Transamerican Freight Lines, Inc. v. Brada Miller Freight Sys., Inc.*, 423 U.S. 28, 96 S.Ct. 229, 46 L.Ed.2d 169, (1975); *Burton v. Diamond Sand and Stone Co.*, 327 So.2d 95 (Fla. Ct. App. 1976); *St. Paul Fire & Marine Ins. Co. v. Frankart*, 370 N.E.2d 1058 (Ill. 1977); *Weeks v. Kelley*, 377 A.2d 444 (Me. 1977); *Schedler v. Rowley Interstate Transportation Co., Inc.*, [68 Ill.2d 7, 11 Ill.Dec. 541] 368 N.E.2d 1287 (Ill.1977); *Matkins v. Zero Refrigerated Lines, Inc.*, 602 P.2d 195 (N.M. 1979); *Kreider Truck Serv., Inc. v. Augustine*, 76 Ill.2d 535, 31 Ill.Dec. 802, 394 N.E.2d 1179 (1979); *Carolina Casualty Ins. Co. v. Insurance Co. of N. Am.*, 595 F.2d 128 (3rd Cir. 1979); *White v. Excalibur Ins. Co.*, 599 F.2d 50 (5th Cir. 1979); *Ronish v. St. Louis*, 621 F.2d 949 (Mont. Ct. App. 1980); *Mustang Transp. Co. v. Ryder Truck Lines, Inc.*, 523 F.Supp. 1097 (E.D. Pa. 1981), *aff'd* (3rd Cir.1982), 688 F.2d 823, *cert. denied* (1983), 459 U.S. 1127, 103 S.Ct. 763, 74 L.Ed.2d 978; *Hershberger v. Home Transport Co.*, 431 N.E.2d 72 (Ill. Ct. App. 1982); *Riddle v. Trans-Cold Express, Inc.*, 530 F.Supp. 186 (S.D. Ill. 1982); *Rankin v. Fischer*, 441 A.2d 426 (Pa. Super. Ct. 1982); *Transport Indem. Co. v. Carolina Cas. Ins. Co.*, 652 P.2d 134 (Ariz. 1982); *Johnson v. Pacific Intermountain Express Co.*, 662 S.W.2d 237 (Mo. 1983); *Grinnell Mut. Reinsurance Co. v. Empire Fire & Marine Ins. Co.*, 722 F.2d 1400 (8th Cir. 1983); *Rodriguez v. Ager*, 705 F.2d 1229 (10th Cir.1983); *Cheney v. Hailey*, 686

(Continued on following page)

P.2d 808 (Colo. Ct. App. 1984); *Shell v. Navajo Freight Lines*, 693 P.2d 382 (Colo. Ct. App. 1984); *Riss Intern. Corp. v. Sullivan Lines, Inc.*, 684 S.W.2d 33 (Mo. Ct. App. 1984); *Strong v. Freeman Truck Line, Inc.*, 456 So.2d 698 (Miss. 1984); *Price v. Westmoreland*, 727 F.2d 494 (5th Cir.1984); *McLean Trucking Co. v. Occidental Fire & Casualty Co.*, 324 S.E.2d 633 (N.C. Ct. App. 1985); *Wilson v. Riley Whittle, Inc.*, 701 P.2d 575 (Ariz. Ct.App.1985); *Empire Fire and Marine Ins. Co. v. Truck Ins. Exchange*, 462 So.2d 76 (D. Fla. 1985); *Aetna Casualty & Surety Co. v. Fairchild*, 620 F.Supp. 1245 (D.C.Idaho 1985); *Rediehs Express, Inc. v. Maple*, 491 N.E.2d 1006 (Ind.App. 3rd Dist. 1986); *Planet Ins. Co. v. Transport Indem. Co.*, 823 F.2d 285 (9th Cir. 1987); *Harvey v. F-B Truck Lines Co.*, 767 P.2d 254 (Idaho 1987); *Wilkerson v. Allied Van Lines, Inc.*, 521 A.2d 25 (Pa. Super. 1987); *John B. Barbour Trucking Co. v. State*, 758 S.W.2d 684 (Tex. Ct. App. 1988); *Empire Fire & Marine Ins. v. Guaranty Nat'l Ins.*, 868 F.2d 357 (10th Cir. 1989); *Ryder Truck Rental Co. v. UTF Carriers, Inc.*, 719 F.Supp. 455 (W.D. Va. 1989); *Fuller v. Riedel*, 464 N.W.2d 97 (Wis. Ct. App. 1990); *Hartford Ins. Co. v. Occidental Fire & Casualty Co.*, 908 F.2d 235 (7th Cir. 1990); *Phillips v. J.H. Transport, Inc.*, 565 So.2d 66 (Ala. 1990); *Integral Ins. Co. v. Lawrence Fulbright Trucking, Inc.*, 930 F.2d 258 (2nd Cir. 1991); *Phillips v. Dallas Carrier Corp.*, 766 F.Supp. 416 (M.D.N.C. 1991); *Johnson v. S.O.S. Transport*, 926 F.2d 516 (6th Cir. 1991); *Wyckoff Trucking, Inc. v. Marsh Bros. Trucking Service, Inc.*, 569 N.E.2d 1049 (Ohio 1991); *Stewart Trucking, Inc. v. PBX, Inc.*, 473 N.W.2d 123 (Neb. 1991); *Baker v. Roberts Express, Inc.*, 800 F. Supp. 1571 (S.D. Ohio 1992); *Paul v. Bogle*, 484 N.W.2d 728 (Mich. Ct. App. 1992); *CC v. Roadrunner Trucking, Inc.*, 823 F. Supp. 913 (D. Utah 1993); *Little Donkey Enterprises, Inc. v. State Accident Ins. Fund*, 856 P.2d 323 (Ore. Ct. App. 1993); *Gamboa v. Conti Trucking, Inc.*, 19 Cal. App. 4th 663 (Cal. Ct. App. 1994); *Royal Indem. Co. v. Jacobsen*, 863 F.Supp. 1537 (D. Utah 1994); *Zamalloa v. Hart*, 31 F.3d 911 (9th Cir. 1994); *Williamson v. Steco Sales, Inc.*, 530 N.W.2d 412 (Wis. Ct. App. 1995); *Graham v. Malone Freight Lines, Inc.*, 948 F.Supp. 1124 (D. Mass. 1996); *Cincinnati v. Haack*, 708 N.E.2d 214 (Ohio Ct. App. 1997); *Gilstorff v. Top Line Exp., Inc.*, 106 F.3d 400 (6th Cir. 1997); *Empire Fire & Marine Ins. Co. v.*

(Continued on following page)

least 35 states³ have heretofore ruled against the untenable notion which the ATF Defendants attempt to advance. "Not only are the sheer numbers against [the ATF Defendants], but the quality and reasoning of the cases disfavor them as well."⁴ The ATF Defendants are playing a shell game in order to deceive this court and the jury into blindly ignoring the heavy weight of legal authority in this instance. "This result cannot be countenanced."⁵

Liberty Mut. Ins. Co., 695 A.2d 624 (Md. Ct. App. 1997); *Century Indem. Co. v. Carlson*, 133 F.3d 591 (8th Cir. 1998); *AXA Global Risks v. Empire Fire & Marine Ins. Co.*, 554 S.E.2d 755 (Ga. Ct. App. 2001); *North American Van Lines, Inc. v. Emmons*, 50 S.W.3d 103 (Tex. Ct. App. 2001); *Consumers County Mut. Ins. Co. v. P.W. & Sons Trucking, Inc.*, 307 F.3d 362 (5th Cir. 2002); *Morris v. JTM Materials, Inc.*, 78 S.W.3d 28 (Tex. Ct. App. 2003); *Oliver & Iverson v. Honeycutt*, 798 N.E.2d 890 (Ind. Ct. App. 2003); *Serna v. Pettey Leach Trucking, Inc.*, 2 Cal. Rptr. 3d 835 (Cal. Ct. App. 2003).

³ Alabama, Arizona, California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Utah, Virginia, and Wisconsin.

⁴ *Harvey v. F-B Truck Lines Co.*, 767 P.2d 254 (Idaho 1987).

⁵ *Cox v. Bond Trans., Inc.*, 53 N.J. 186, 249 A.2d 579 (N.J. 1969), *cert. denied* 395 U.S. 935 (1969).

1. HISTORY OF THE FEDERAL MOTOR CARRIER SAFETY REGULATIONS

In 1953, while addressing carriers' conduct similar to that engaged in by the ATF Defendants in the instant case, **the United States Supreme Court described such practices as "evils that had grown up" in the industry.**⁶ More recently, one court, citing a Tennessee case as support for its 2003 ruling, described the position previously taken by a motor carrier such as ATF, by incredulously stating the "suggestion that it could lawfully engage in the transportation . . . without regulation by the Surface Transportation Board is **just plain wrong**"⁷ Another court declared that "[s]uch an application **would not advance the public policy goals of the Motor Carrier Act in protecting the general public, and it would also defy common sense.**"⁸

The Defendants are vicariously liable for any negligence attributed to Robert W. Carnley relating to the subject collision, regardless of how Mr. Carnley is labeled by the ATF Defendants. Congress has implemented the Federal Motor Carrier Safety Regulations ("FMCSRs") which govern the operation of commercial

⁶ *American Trucking Ass'ns v. United States*, 344 U.S. 298, 301 (1953) (emphasis added).

⁷ *Serna v. Pettey Leach Trucking, Inc.*, 2 Cal. Rptr. 3d 835, 845 (Cal. Ct. App. 2003) (emphasis added).

⁸ *Royal Indem. Co. v. Jacobsen*, 863 F.Supp. 1537 (D. Utah 1994) (emphasis added).

motor carriers.⁹ The regulations were given birth in 1935 and have evolved since that time through extensive legislation and judicial interpretation. In order for the Court and the Defendants to better appreciate each basis upon which the ATF Defendants are vicariously liable for any negligence attributed to Mr. Carnley, it is important to review the distinguished history of the Federal Motor Carrier Safety Regulations (Title 49 of the Code of Federal Regulations) ("FMCSRs"). **"The arduous road has been often traced."**¹⁰

With roots extending back to the steamboat era, the federal safety regulations have influenced the American motor carrier industry since 1935. Soon after they were enacted, however, motor carriers began taking advantage of weaknesses in the regulatory framework which permitted them to evade liability for the torts of their drivers by engaging in linguistic gymnastics. The *Rediehs* Court discussed the history of the FMCSRs and the problematic practice by motor carriers of classifying drivers as "independent contractors" when it opined that,

The history of the regulations of motor carriers reveals that after the commencement of regulation in 1935, because of stringent and comprehensive rules regulating the conduct,

⁹ 49 C.F.R. § 350 *et seq.* (2002).

¹⁰ *Agricultural Transportation Assoc. of Texas v. King*, 349 F.2d 873 (5th Cir. 1965).

operation, financial ability, and insurance coverage of the motor truck industry, a substantial number of carriers possessing ICC certificates began to use equipment owned and driven by truckers who had no such ICC operating authority. This use was accomplished by a variety of leases, trip leases, and by other arrangements under which owner-operator truckers carried on the operations of the carriers with operating authority. **In contracting with such persons the carriers took care to constitute the lessors as independent contractors which enabled them to avoid the commission's safety, financial, and insurance regulations that had been prescribed for equipment and drivers in order to protect the public. Many of the owner-operators without authority were *itinerant truckers known as "gypsies," fly-by-night truckers with poor, unsafe equipment who had little financial ability. They may or may not have had adequate insurance.*** The hard core of the problem was the trip lease and its attendant evils which permitted an indifferent carrier to evade its safety and financial responsibility. (citation omitted). The practice of leasing made it difficult in accident cases to fix responsibility, and certified carriers could thus escape the consequences of the regulations and responsibility for accidents *by employing irresponsible persons as independent contractors who were not*

*financially accountable and who had no insurance or were under-insured. (citation omitted). Thousands of unregulated trucks were on the road. (citation omitted).*¹¹

The Ohio Court of Appeals commented upon this issue when it opined that,

Motor carriers were able to avoid liability by taking advantage of the common-law master-servant test. Motor carriers would lease their vehicles from independent contractors, who were usually independent individuals who owned their own vehicles. Motor carriers would then structure their lease agreements so that the drivers and the trucks could not be found to be under the "control" of the lessee motor carrier. Thus, the responsibility for accidents would fall on the single, independent truck-owner rather than the deeper pockets of the motor carrier company. As a result, motor carrier companies, who were primarily in the business of hauling loads for clients by truck, were able to escape liability for virtually all motor vehicle accidents occurring in the motor carrier's business.¹²

¹¹ *Rediehs Express, Inc. v. Maple*, 491 N.E.2d 1006 (Ind. Ct. App. 1986) (emphasis added).

¹² *Cincinnati v. Haack*, 708 N.E.2d 214 (Ohio Ct. App. 1997).

The Texas Court of Appeals also discussed motor carriers' use of the term "independent contractors" when it noted that,

[d]uring the first half of the twentieth century, interstate motor carriers attempted to immunize themselves from liability for negligent drivers by leasing trucks and nominally classifying the drivers who operated the trucks as 'independent contractors.' (citations omitted).¹³

The Maryland Court of Appeals opined that,

In the 1950's, it was common practice for trucking companies to attempt to immunize themselves from liability by using independent truck drivers or by denominating the regular drivers as independent contractors.¹⁴

In *Graham v. Malone Freight Lines*, the court noted that,

In the past, motor carriers leased trucks and then disclaimed any responsibility when those same trucks injured members of the public. One major concern was the fact that "the use of non-owned vehicles led to public confusion as to

¹³ *Morris v. JTM Materials, Inc.*, 78 S.W.3d 28, 37-38 (Tex. Ct. App. 2003) (emphasis added).

¹⁴ *Empire Fire & Marine Ins. Co. v. Liberty Mut. Ins. Co.*, 695 A.2d 624 (Md. Ct. App. 1997) (emphasis added).

who was financially responsible for accidents caused by those vehicles.”¹⁵

In hiring “independent contractors” and, thereby, escaping liability for the tortious acts committed by those drivers, the motor carrier industry created an atmosphere of danger on the public roadways because “[m]any of the owner-operators without authority were itinerant truckers known as ‘gypsies’, fly-by-night truckers with poor, unsafe equipment *who had little financial ability. They may or may not have had adequate insurance.*”¹⁶ So, drivers with little or no means to compensate the victims of catastrophic tortious conduct often were found at fault while the motor carriers that employed these drivers and, thereby placed the drivers on the road, were often able to avoid liability. However, “[i]t is the motor carrier who has put the entire trip in motion.”¹⁷ In discussing one case of evasion of motor carrier regulations, the United States Court of Appeals for the Fifth Circuit noted that “[w]hen, however, the contracts are read in the light of the construction accorded them by the parties by the actual operations under them, it is clear that the **scheme as a whole is a mere subterfuge, an**

¹⁵ *Graham v. Malone Freight Lines, Inc.*, 948 F.Supp. 1124, n.3 (D. Mass. 1996).

¹⁶ *Rediehs Express, Inc. v. Maple*, 491 N.E.2d 1006, 1010 (Ind. Ct. App. 1986).

¹⁷ *American Transit Lines v. Smith*, 246 F.2d 86, 87 (6th Cir. 1957).

unpermitted evasion, not a real avoidance of the provisions of the law."¹⁸ The United States Court of Appeals for the Eighth Circuit noted, in regard to the statutory construction which effectuates statutory policy, that

Moreover, it is fundamental that a statute must be construed in light of the purposes it seeks to achieve and the evils it seeks to remedy; and that remedial legislation is entitled to a broad interpretation so that its public purposes may be fully effectuated. (citation omitted).¹⁹

The United States Supreme Court expressed its discomfort with the situation when it noted that "[i]t is an **unnatural construction of the Act which would require the Commission to sit idly by and wink at practices that lead to violations of its provisions.**"²⁰ The prevalence of this and other similar practices in the motor carrier industry prompted Congress to act in 1956.

In 1956, Congress enacted legislation that curtailed motor carriers' various efforts to evade responsibility. Indeed, according to the *Morris* Court,

¹⁸ *Georgia Truck System, Inc. v. Interstate Commerce Commission*, 123 F.2d 210 (5th Cir. 1941) (emphasis added).

¹⁹ *Binkley Mining Co., Inc. v. Wheeler*, 133 F.2d 863 (8th Cir. 1943).

²⁰ *American Trucking Ass'ns v. United States*, 344 U.S. 298, 311 (1953).

In order to protect the public from the tortious conduct of the often *judgment-proof truck-lessor operators*, Congress in 1956 amended the Interstate Common Carrier Act to require interstate motor carriers to assume full direction and control of the vehicles that they leased 'as if they were the owners of such vehicles.' (citation omitted). The purpose of the amendments to the Act was to ensure that interstate motor carriers would be fully responsible for the maintenance and operation of the leased equipment and the supervision of the borrowed drivers, thereby protecting the public from accidents, preventing public confusion about who was financially responsible if accidents occurred, and providing financially responsible defendants.²¹

The United States Court of Appeals for the Fifth Circuit noted that,

[i]n order to protect the public from the tortious conduct of *judgment-proof operators* of interstate motor carrier vehicles, Congress in 1956 amended the Interstate Common Carrier Act to require a motor carrier to assume full direction²²

²¹ *Morris v. JTM Materials, Inc.*, 78 S.W.3d 28, 37-38 (Tex. Ct. App. 2003).

²² *Price v. Westmoreland*, 727 F.2d 494 (5th Cir. 1984)

As a result of these amendments, motor carriers could no longer avoid liability by denominating a driver as an "independent contractor" because carriers were deemed to be in "full direction and control of the vehicles that they leased."²³ The rationales for the amendments, according to Congress, were many. The *Cox* court clearly identified the objectives,

The salutary objectives ... we think bear repeating. They are to insure responsibility for, and control over, the leased equipment by the lessee carrier, when the equipment is operated by the owner or employees of the owner. These are basic requirements that are inherent in the relation of the for-hire carrier to the public. When they are lacking, the chaotic conditions that preceded enactment of the Motor Carrier Act, 1935 inevitably ensue.' This result cannot be countenanced.²⁴

In 1992, the *Baker* Court noted that "the intent [of the regulations] was to make sure that licensed carriers would be responsible in fact, as well as in law, for ... the supervision of borrowed drivers."²⁵ Additionally, according to the

²³ *Id.*

²⁴ *Cox v. Bond Transp., Inc.*, 249 A.2d 579 (N.J. 1969) (citing *Christian v. United States*, 152 F.Supp. 561, 567 (D. Md. 1957)).

²⁵ *Baker v. Roberts Express, Inc.*, 800 F.Supp. 1571 (S.D. Ohio 1992) (citing *Proctor v. Colonial Refrigerated Transp., Inc.*, 494 F.2d 89 (4th Cir. 1974)).

Emmons Court, **"the very purpose of Congress was to deal with motor carriers' efforts to designate those who drove trucks for them as 'independent contractors' in order to immunize themselves from liability."**²⁶ The *Johnson* Court opined that **"[o]ne important purpose of the regulatory scheme is to protect persons who are injured in highway accidents, by increasing the likelihood that a substantial entity will be available to respond to any judgment rendered . . . these holdings . . . represent the consensus of judicial authority based on analysis of statutory policy and implementing regulations."**²⁷ The regulations served to **"eliminate the difficulty faced by an injured plaintiff in determining who controlled the vehicle; the purpose upon which the vehicle was embarked at the time of the accident; and the questions of agency, employee or independent contractor status, frolic and detour, and borrowed employee."**²⁸ The *Rediehs* Court further noted that **"[t]he plaintiff encounters much difficulty in fixing responsibility, for only the carrier and his lessor really know their arrangements. A plaintiff should not be required to bear this**

²⁶ *North American Van Lines, Inc. v. Emmons*, 50 S.W.3d 103, 121 (Tex. Ct. App. 2001) (emphasis added).

²⁷ *Johnson v. Pacific Intermountain Express Co.*, 662 S.W.2d 237 (Mo. 1983).

²⁸ *Rediehs Express, Inc. v. Maple*, 491 N.E.2d 1006 (Ind. Ct. App. 1986).

burden *nor should he be required to settle for a financially irresponsible defendant fathered by the carrier . . . If the carrier has been derelict in employing an under-insured, financially irresponsible or incompetent lessor, it has only itself to blame.*"²⁹

The *Wyckoff* Court opined that "the 'bright-line' guidelines set forth in the I.C.C. regulations under the majority viewpoint unmistakably fix liability for the accident instead of essentially forcing the innocent victim to sue everyone in order to redress his injuries and damages".³⁰ Another court noted that, pursuant to the FMCSRs, "so long as the public and shippers are protected, parties can allocate risks among themselves in any manner they wish."³¹ Thus, collectively, the FMCSRs work together to eliminate the "independent contractor" versus "employee" distinction in the motor carrier industry. The United States Court of Appeals for the Seventh Circuit opined that "[t]hese rules were intended to safeguard the public by preventing authorized carriers from circumventing applicable regulations by leasing the equipment and services of

²⁹ *Rediehs Express, Inc. v. Maple*, 491 N.E.2d 1006, 1012 (Ind. Ct. App. 1986) (emphasis added).

³⁰ *Wyckoff Trucking, Inc. v. Marsh Bros. Trucking Service, Inc.*, 569 N.E.2d 1049 (Ohio, 1991) (emphasis added).

³¹ *Empire Fire & Marine Ins. v. Guaranty Nat'l Ins.*, 868 F.2d 357, 362 (10th Cir. 1989).

independent contractors exempt from federal regulation.³² In the end, the modern laws (currently 49 C.F.R. §§ 376.11, 376.12, 390.5 and 49 U.S.C. § 14102) prevent motor carriers from evading responsibility for the negligent acts of their drivers by attempting to label them as “independent contractors.”

2. FEDERAL MOTOR CARRIER SAFETY REGULATIONS ELIMINATE THE INDEPENDENT CONTRACTOR DEFENSE

FMCSR, 49 C.F.R. § 390.5, absolutely eliminates the distinction between “independent contractors” and “employees” so that any attempt by a carrier to label a driver as one or the other is an exercise in futility. Drivers, including independent contractors, are now legislatively deemed “statutory employees” of motor carriers and, as such, motor carriers can no longer escape liability through the use of linguistic gymnastics. The carrier’s fate is now inextricably intertwined with that of its driver. The *Shell* Court noted that “[t]he regulations, which have the force and effect of law, eliminate the defense of independent contractor by making the owner/

³² *Hartford Ins. Co. v. Occidental Fire & Casualty Co.*, 908 F.2d 235 (7th Cir. 1990) (citing *American Trucking Ass’n, Inc. v. United States*, 344 U.S. 298, 302-306 (1953)).

operator of the equipment the "statutory employee" of the carrier."³³ Another court noted that,

an interstate motor carrier's liability for equipment and drivers ... is not governed by the traditional common-law doctrines of the master-servant relationship and respondeat superior. Instead, an interstate carrier is vicariously liable as a matter of law ... for the negligence of its statutory employee drivers.³⁴

In 49 C.F.R. § 390.5, the FMCSRs define the term "employee" as,

any individual, other than an employer, who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety. Such term includes a driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle), a mechanic, and a freight handler.³⁵

³³ *Shell v. Navajo Freight Lines*, 693 P.2d 382 (Colo. Ct. App. 1984) (emphasis added).

³⁴ *Morris*, 78 S.W.3d at 39 (emphasis added).

³⁵ 49 C.F.R. § 390.5 (2002) (emphasis added). See *Consumers County Mut. Ins. Co. v. P.W. & Sons Trucking, Inc.*, 307 F.3d 362 (5th Cir. 2002).

Question 17 of the official interpretations to 49 C.F.R. § 390.5 contains the following question and guidance:

Question 17: May a motor carrier that employs owner-operators who have their own operating authority issued by the ICC or the Surface Transportation Board transfer the responsibility for compliance with the FMCSRs to the owner-operators?

Guidance: No. The term "employee," as defined in § 390.5, specifically includes an independent contractor employed by a motor carrier. The existence of operating authority has no bearing upon the issue. The motor carrier is, therefore, responsible for compliance with the FMCSRs by its driver employees, including those who are owner-operators.³⁶

Indeed, in 1991 the United States Court of Appeals for the Sixth Circuit in *Johnson v. S.O.S. Transport, Inc.* held that,

Importantly, . . . the operator's status, whether it be as an independent contractor or employee of a carrier, is

³⁶ 62 Fed. Reg. 16,407 (April 4, 1997). 49 CFR Chapter III: Regulatory Guidance for the Federal Motor Carrier Safety Regulations, Interpretation to § 390.5, question 17 (1997) (emphasis added). See also 49 C.F.R. § 390.5 (2002).

irrelevant. 49 U.S.C.App. § 2503(2) defines an "employee" as including "an operator of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle). . . ." This same section also defines an "employer" as "any person engaged in a business affecting interstate commerce who owns or leases a commercial motor vehicle in connection with that business . . ." 49 U.S.C.App. § 2503(3)³⁷

The *Johnson* Court echoed similar concerns of the ICC during the regulatory enactment process when it stated "[w]e note that the 'control and responsibility' regulations were initially prompted by concerns that certified carriers were evading federal safety requirements by using equipment leased from owner-operators who were exempt from the limitations placed upon certified carriers."³⁸ The *Johnson* Court further recognized that a "statutory employee" relationship clearly eliminates the independent

³⁷ *Johnson v. S.O.S. Transport*, 926 F.2d 516 (6th Cir. 1991) (emphasis added). See *Gilstorff v. Top Line Exp., Inc.*, 106 F.3d 400 (6th Cir. 1997).

³⁸ *Johnson v. S.O.S. Transport*, 926 F.2d 516, n.17 (6th Cir. 1991) (citing *Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems*, 423 U.S. 28, 37, 96 S.Ct. 229, 234, 46 L.Ed.2d 169 (1975); *American Trucking Ass'ns, Inc. v. United States*, 344 U.S. 298, 302-05, 73 S.Ct. 307, 310-12, 97 L.Ed. 337 (1953); *Indiana Refrigerator Lines, Inc. v. Dalton*, 516 F.2d 795, 796 (6th Cir. 1975), cert. denied, 423 U.S. 985, 96 S.Ct. 392, 46 L.Ed.2d 302 (1975)).

contractor concept and creates an *irrebuttable presumption of vicarious liability as a matter of law* for the motor carrier as a consequence of any tortious acts committed by its driver when it opined that,

The statute and regulatory pattern clearly eliminates the independent contractor concept from such lease arrangements and casts upon [the carrier-lessee] full responsibility for the negligence of [the driver] of the leased equipment. Any language to the contrary in the lease agreement would be violative of the spirit and letter of the federal regulations and therefore unenforceable.

Additionally, in *Laux v. Juillerat*, (citation omitted) the court ruled, as a **conclusion of law**, that federal regulations require a carrier-lessee to assume legal control of the leased vehicle and driver. Thus, the carrier-lessee should be held vicariously liable for the negligence of the driver and the resulting damages.

Accordingly, this Court finds that the ICC regulations enacted pursuant to the Interstate Common Carrier Act create **an irrebuttable presumption of an employment relationship between a driver of a leased vehicle furnished by a contractor-lessor and a carrier-lessee. This employment relationship is known as statutory employment. Any negligence on the part of the driver of the leased**

vehicle is imputed to the carrier-lessee as a matter of law. The common law doctrines of master-servant, respondeat superior and independent contractor are preempted by these regulations.³⁹

More recently, in 2002, the *Morris* Court opined that “... an interstate carrier is vicariously liable as a matter of law under the FMCSR for the negligence of its statutory employee drivers. (citations omitted).”⁴⁰

As a “statutory employee,” any fault attributed to Mr. Carnley is imputed to ATF, and as such, ATF cannot purge itself of liability by applying the label of “independent contractor” to Mr. Carnley. The “crushing weight of authority”⁴¹ supports the Plaintiffs’ position on the issue. Courts throughout the United States have overwhelmingly so held, and have found motor carriers . . . liable for the acts of their tortfeasor “statutory employee” driver.⁴² One court noted that “[t]herefore the trial courts were correct in charging the juries that these defendants could not escape liability by delegating their duties to independent contractors.”⁴³

³⁹ *Johnson v. S.O.S. Transport*, 926 F.2d 516 (6th Cir. 1991)

⁴⁰ *Morris v. JTM Materials, Inc.*, 78 S.W.3d 28 (Tex. Ct. App. 2002).

⁴¹ *Georgia Truck System, et al.*, *supra* note 16, at pp. 4-5.

⁴² *Id.*

⁴³ *Cincinnati v. Haack*, 708 N.E.2d 214 (Ohio Ct. App. 1997).

3. FAILURE TO COMPLY WITH WRITTEN LEASE REQUIREMENTS NOT A DEFENSE

ATF is also vicariously liable for the acts of Mr. Carnley because under federal regulations and case law the lack of a written agreement between a motor carrier and a driver is not relevant in determining that liability for the driver's negligence is imputed to the motor carrier. The *Fuller* Court held that,

The cases are uniform in holding that the absence of a written trip lease is legally irrelevant. In *Cox v. Bond Transportation, Inc.*, 53 N.J. 186, 249 A.2d 579 [586-87] (1969), *cert. denied*, 395 U.S. 935, 89 S.Ct. 1999, 23 L.Ed.2d 450 (1969)

* * *

The regulations described above have the force and effect of law. A franchised interstate carrier cannot evade them by making an oral or written lease with an owner-operator of equipment for a trip, for a day or for an indefinite period, which attempts to exclude or to limit their application. When such a carrier engages an owner-operator of a tractor intending to have him transport goods for it on the public highways and interstate commerce . . . the regulations must be deemed included in their contract. (Citations omitted.)⁴⁴

⁴⁴ *Fuller v. Riedel*, 464 N.W.2d 97 (Wis. Ct. App. 1990).

The Wisconsin Court of Appeals opined that "... **a lease may be formed by conduct or words; it need not be written. Although ICC regulations require the carrier to have a written lease, the failure to have one does not absolve the carrier of liability if an oral lease exists.**"⁴⁵ The Colorado Court of Appeals discussed oral "agreements" between drivers and motor carriers similar to the situation in the case at bar and determined that,

During trial, Johnson's deposition was admitted into evidence. In the deposition, **Johnson stated that an American Red Ball agent [orally] instructed him to drive to Colorado Springs to "pick up a load of 6,000 pounds going to Utah."** This evidence was corroborated by the testimony of an operations manager for American Red Ball, as well as by a stipulation entered into by the parties "that Johnson was sent to Colorado Springs as a directive [sic] of American Red Ball Company."

This evidence, which is neither disputed nor conflicting, establishes an agreement between American Red Ball and Johnson wherein Johnson agreed to act on behalf of American Red Ball. Therefore, **the trial court did not err in determining as a**

⁴⁵ *Williamson v. Steco Sales, Inc.*, 530 N.W.2d 412 (Wis. Ct. App. 1995) (citing *Fuller v. Riedel*, 464 N.W.2d 97, 101 (Wis. Ct. App. 1990); *Zamalloa v. Hart*, 31 F.3d. 911, 917-918 (9th Cir. 1994)).

matter of law that an agency relationship existed.⁴⁶

In another case, the Missouri Supreme Court addressed unwritten/oral agreements when it noted, in 1983, that,

Perhaps it will be helpful first to explore the practicalities of the situation rather than the legalities. Marlo was in touch with a customer who had a truckload of steel. It was looking for a truck. Brown and Singleton had a truck provided to them by Tabor, who had leased it, and, with full authority from Tabor, were trying to locate payloads. Marlo and the truckers got together on a proposition to haul a load for Franklin Steel to Broken Arrow, Oklahoma. **They did not put the details in writing but rather operated informally.** Marlo was to collect from the customer, retain 25%, and remit the balance to Tabor. **Nobody seemed to have the least concern about the total absence of operating authority;**

* * *

Marlo, then, was instrumental in launching and directing the truck journey. **This is not a situation in which Marlo should be allowed to escape liability by asserting independent contractor status.** Our courts have been hesitant to uphold claims

⁴⁶ *Cheney v. Hailey*, 686 P.2d 808 (Colo. Ct. App. 1984).

for this kind of immunity. **There is a distinct tendency to find that truck operators are agents or servants rather than independent contractors.**;B0099;B0099 Marlo's case is not helped by the fact that it did not try to place the load with a regular, certified carrier, having regular routes and published tariffs, but rather did business with itinerant truckers with no semblance of operating authority. It is easier to find an independent contractor relationship when the purported contractor holds itself out to the public as having a regular and established business.;B01010;B01010 But the illegality of the operation is not the controlling circumstance. **The usual rule holds those who engage in business for profit liable in damages, on the usual negligence principles, to those who are injured in the course of the business operations. There is no reason to relieve Marlo of this normal and usual liability.**⁴⁷

The *Cox* Court noted that,

[t]hus when a lessor-operator is engaged by the carrier for operation within the scope of the regulations he becomes what has been described as a 'statutory' employee of the carrier, *Brannaker v. Transamerican Freight Lines, Inc.*, 428 S.W.2d 524, 535

⁴⁷ *Johnson v. Pacific Intermountain Express Co.*, 662 S.W.2d 237 (Mo. 1983).

(*Mo. Sup. Ct. 1968*), and the relation between them, **whether oral or written**, is governed by the regulations. And when the relation arises, the carrier-lessee takes 'exclusive possession, control, and use of the equipment, and * * * the **complete assumption of responsibility**. . . .

So, despite non-compliance with the provisions of 49 C.F.R. §§ 376.11 and 376.12, liability will nonetheless attach to motor carriers which fail to follow the law by not executing a written trip lease. The United States Court of Appeals for the Ninth Circuit squarely addressed the issue of motor carriers failing to meet the written leasing requirements by having only oral agreements when it held that,

The leading case in this circuit on whether liability can be imposed on a carrier even absent substantial compliance with § 1057.11(a)-(d) is *Planet Insurance v. Transport Indemnity*, 823 F.2d 285 (9th Cir. 1987). In *Planet Insurance*, the plaintiff attempted to hold a carrier liable for injuries resulting from an accident involving a leased truck. The truck driver had signed a written lease with the carrier lessee, but had neither picked up his load nor begun displaying the carrier lessee's placard at the time of the accident. The carrier argued that compliance with the regulatory requirements, specifically, display of the carrier's placard, was a precondition to establishing statutory employment and liability under the ICC regulations. We did not agree, holding that **failure to comply with the**

regulatory requirements could not relieve the carrier from liability so long as the vehicle was in fact under the control of the carrier. To hold otherwise would be to 'stray impermissibly from the allocation of responsibility contemplated by Congress and the ICC' . . . No court has held that a written lease is a condition precedent to imposition of statutory liability on carrier lessees. See *Wilson v. Riley Whittle, Inc.*, 145 Ariz. 317, 701 P.2d 575 (Ct.App. 1985) ("the absence of a written trip lease is legally irrelevant"); see also *Fuller v. Riedel*, 159 Wis.2d 323, 464 N.W.2d 97 (Ct.App. 1990) (finding statutorily liable a carrier lessee who entered into an oral trip lease and whose sign was not displayed at the time of the accident); *Cox v. Bond Transportation, Inc.*, 53 N.J. 186, 249 A.2d 579 (carrier lessee statutorily liable under an oral lease for an accident that occurred while the driver was on his way home), *cert. denied*, 395 U.S. 935, 89 S.Ct. 1999, 23 L.Ed.2d 450 (1969).⁴⁸

The Montana Court of Appeals noted while holding against a noncompliant motor carrier that "[h]ere, a written lease between the parties was absent, and, more importantly, TVT ignored the ICC safety regulations designed to protect the public from the type of accident here

⁴⁸ *Zamalloa v. Hart*, 31 F.3d 911 (9th Cir. 1994).

involved.”⁴⁹ In *Wilson*, the court, citing a sister court as support, emphasized that the carrier lessee’s own loose internal procedures had allowed the load to be picked up without a signed lease by recognizing that,

The court reasoned that the public policy behind 49 C.F.R. § 1057 would be wrongfully frustrated if the court allowed the carrier lessee ‘to evade the liability imposed upon it . . . by asserting that a written trip lease was a condition precedent to any contract between the parties.’ *Wilson*, 145 Ariz. at 321, 701 P.2d at 579. We agree. It would defeat the intent behind § 1057 to enable carriers to benefit from their own failure to comply with ICC regulations. *Id.* at 287.⁵⁰

The *Wilson* Court noted that “[n]o court has held that a written lease is a condition precedent to imposition of statutory liability on carrier lessees.”⁵¹ Another court noted that “[t]he cases are uniform in holding that the absence of a written trip lease is legally irrelevant.”⁵² The Pennsylvania Superior Court opined that, “[w]e

⁴⁹ *Ronish v. St. Louis*, 621 F.2d 949 (Mont. Ct. App. 1980).

⁵⁰ *Zamalloa v. Hart*, 31 F.3d 911 (9th Cir. 1994) (emphasis added).

⁵¹ *Zamalloa v. Hart*, 31 F.3d 911 (9th Cir. 1994) (citing *Wilson v. Riley Whittle, Inc.*, 145 Ariz. 317, 701 P.2d 575 (Ct.App. 1985)).

⁵² *Fuller v. Riedel*, 464 N.W.2d 97 (Wis. Ct. App. 1990) (emphasis added).

cannot expose the public to the indifference of a motor carrier who escapes liability simply because it has either failed to execute a written lease or has not covered the particular activity of the lessor in the written leases.⁵³

4. INTERSTATE/INTRASTATE DISTINCTION IS NO DEFENSE

ATF has also asserted that the FMCSRs are inapplicable because it was not engaged in interstate commerce at the time the collision occurred. This contention is misplaced not only because the State of Georgia has adopted the FMCSRs, but also because ATF most certainly was engaged in interstate commerce at the time of the subject collision. In fact, the shipment being transported by Mr. Carnley at the time of the crash was shipped from a shipper in Georgia to a consignee in California on an interstate bill of lading. Courts have determined that a motor carrier is vicariously responsible for the intrastate trips of its "statutory employees" and, as such, a carrier cannot avoid liability by asserting that the FMSCRs are inapplicable on the grounds that the trip was wholly intrastate.⁵⁴

⁵³ *Rankin v. Fischer*, 441 A.2d 426 (Pa. Super. Ct. 1982) (emphasis added).

⁵⁴ See *infra* § III, subsection F, pp. 63-84.

5. THERE IS NO MERIT TO ATF'S CLAIM THAT LIABILITY SHOULD ATTACH TO ANOTHER CARRIER THAT WAS CALLED AFTER THE COLLISION TO HAUL A CONSOLIDATED LOAD FROM CHATSWORTH, GEORGIA, TO CALIFORNIA, AS ATF WAS THE ONLY MOTOR CARRIER ASSOCIATED WITH THE SHIPMENT AT THE TIME OF THE WRECK.

At mediation and at pre-trial conference, counsel for the ATF and Clarendon defendants asserted that liability should be shifted to Shippers Service, a motor carrier that was called after the wreck to haul a consolidated load including the carpet that was on the truck at the time of this wreck, and was first identified in this case after expiration of the statute of limitations. A diligent search by Plaintiff's counsel of all state and federal courts on Westlaw has revealed no authority to support that position. If the Plaintiff had sued Shipper's Service, that would have been a frivolous lawsuit subject to a motion for summary judgment and perhaps sanctions for abusive litigation because there would have been no basis for the claim.

6. BECAUSE TRANSPORTATION OF AN INTERSTATE SHIPMENT MUST BE UNDER THE AUTHORITY OF A MOTOR CARRIER, AND ATF THROUGH ITS AGENT C&C TOOK RESPONSIBILITY FOR MOVING FREIGHT FROM SHIPPERS TO A POINT OF CONSOLIDATION, ATF EVEN IN A ROLE AS A FREIGHT BROKER MUST BE CLASSIFIED AS A "FORWARDER-COMMON CARRIER," RATHER THAN MERE "BROKER" OR "FREIGHT FORWARDER," AND, THEREFORE, OWES THE DUTIES OF COMMON CARRIER.

A "broker" is defined at 49 U.S.C.A. § 13102(2) as "a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation."

"A broker does not have a role in the actual assembly or carriage of the goods." *Transportation Revenue Management, Inc. v. First NH Investment Services Corp.*, 886 F.Supp. 884, 886 (D.D.C. 1995).

A "freight forwarder" is defined at 49 U.S.C.A. § 13102(8) as "a person holding itself out to the general public (other than as a pipeline, rail, motor, or water carrier) to provide transportation of property for compensation and in the ordinary course of its business – (A) assembles and consolidates, or provides for assembling and consolidating, shipments and performs or provides for break-bulk and distribution operations of the shipments; (B) assumes responsibility

for the transportation from the place of receipt to the place of destination; and (C) uses for any part of the transportation a carrier subject to jurisdiction under this subtitle."

A "motor carrier" is defined at 49 U.S.C.A. § 13102(14) as "a person providing commercial motor vehicle (as defined in section 31132) transportation for compensation."

Both a "broker" and a "freight forwarder" may arrange for carriers to transport goods, but mere brokers do not play role in actual assembly or carriage of goods. A property broker arranges transportation of property by authorized motor carrier but is not permitted to act as a carrier, whereas a freight forwarder plays a role in the assembly, consolidation, break bulk, and distribution of shipments, assumes responsibility for shipment from receipt to place of destination, uses carriers subject to Interstate Commerce Commission (ICC) jurisdiction, and may act as a carrier. *Transportation Revenue Management, Inc. v. First NH Inv. Services Corp.*, 886 F.Supp. 884 (D.D.C., 1995).

A broker or freight forwarder who never actually handles the goods, is little more than a "travel agent. *ABN Amro Verzekeringen BV v. Geologistics Americas, Inc.*, 253 F.Supp.2d 757 (S.D.N.Y., 2003).

However, a company that arranges to ship a customer's goods by truck and air and has a role in handling the goods is a "forwarder-common carrier," rather than mere "freight forwarder," and, therefore,

owes the duties of common carrier. *Royal Ins. Co. v. Fountain Technologies, Inc.*, 984 F.Supp. 724 (S.D.N.Y., 1997. Under the terms of the Sales Agency Agreement, C&C was the agent of ATF in soliciting business and consolidating loads for interstate shipment. That consolidation of loads necessarily involved moving freight by truck from shippers to the point of consolidation. Therefore, even if ATF claimed to be operating as a broker or freight forwarder, that would fail because a broker freight forwarder cannot be involved in handling the goods without assuming the responsibility of a motor carrier. Since ATF, through its "sales agent" C&C, was involved in actually moving goods by truck from the shipper's location to the point of load consolidation at a time when there was no other authorized motor carrier involved in the transport, it cannot be treated as a pure broker or freight forwarder, but must be viewed as either a motor carrier or a "forwarder-common carrier." Both would have identical financial responsibility to the traveling public for operation of the truck on which the goods were hauled.

7. THE WORD "PREPONDERANCE" IS NOTORIOUSLY CONFUSING TO JURORS, SO THE CIVIL BURDEN OF PROOF SHOULD BE EXPLAINED IN CLEARER LANGUAGE.

Plaintiff's Request to Charge No. 2 expresses the rule on the civil burden of proof without confusing legal jargon, and should be given to the jury in lieu of the pattern charge.

Legal jargon is convenient shorthand for discussion among lawyers and judges, but it is often incomprehensible to intelligent, well-educated lay jurors. The word "preponderance" is rarely used by non-lawyers in everyday speech. In one study involving 114 experienced jurors, instructions lasting 20 minutes and involving no complex issues were read to participants. The jurors were tested immediately after having heard the instructions for comprehension. Nearly one-half of the jurors defined preponderance of the evidence as 'looking at the exhibits in the jury room,' or as 'slow and careful pondering of the evidence.' Robert F. Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 B.Y.U. L.Rev. 601, 613-15 (1975).

The Georgia Suggested Pattern Jury Instructions, Volume I: Civil Cases, 010.040 D. Burden of Proof, makes a small step toward clarity by explaining that "preponderance" is the "superior weight" of evidence. However, some of the definitions and connotations of "superior" may lead to misunderstanding in the minds of some jurors. The definitions of "superior" include the following: "of higher degree or rank," "not material or natural," "having or seeming to have a higher level of reality or existence," "courageously or serenely indifferent," "of more importance, value, usefulness, or merit," "of greater force, influence, or efficaciousness," and "greater in quantity or amount." "superior." *Webster's Third New International Dictionary, Unabridged*. Merriam-Webster, 2002. <http://unabridged.merriam-webster.com> (29 Aug. 2004).

In *Zwiren v. Thompson*, 276 Ga. 498, 578 S.E.2d 862 (2003), the court stated that preponderance requires only that the fact finder be inclined by the evidence toward one side or the other, and authorized the finder of fact to employ logic, common sense and a sense of justice in that determination. In *Brown v. Macheers*, 249 Ga.App. 418, 547 S.E.2d 759 (2001), the court allowed us of the "scales of justice" analogy to illustrate the civil burden of proof. See also, *State v. Bradley*, 60 Conn.App. 534, 760 A.2d 520 (2000) ("scales of justice"); *Brewer v. Wal-Mart Stores, Inc.*, 87 F.3d 203 (7th Cir. 1996) ("scales of justice," "more probably true than not"); *Heartland Federal Savings & Loan Association v. Briscoe Enterprises*, 994 F.2d 1160, 1163 (5th Cir. 1993) (preponderance means that it is more likely than not); 32A C.J.S. Evidence § 1018 (preponderance of the evidence means evidence which is of greater weight or more convincing than that which is offered in opposition).

Jury instructions do not need to track exactly the language of pattern jury instructions, so long as the charge is a correct statement of the law and not confusing or misleading. *Watkins v. State*, 265 Ga.App. 54, 592 S.E.2d 868 (2004). As was recently demonstrated, the Supreme Court does not shirk from adopting clearer language to improve the pattern instructions. See, e.g., *Zwiren v. Thompson*, 276 Ga. 498, 578 S.E.2d 862 (2003). Therefore, now is the time for this court to modify the "preponderance of evidence" charge to make it more comprehensible.

8. THE PATTERN CHARGE ON "PROXIMATE CAUSE" IS NOTORIOUSLY CONFUSING TO JURORS, SO THE UNDERLYING PRINCIPLE OF LAW SHOULD BE EXPLAINED WITH CLEARER LANGUAGE.

Plaintiff's Request to Charge No. 3 expresses the rule on legal causation without use of the term "proximate cause," which is no less confusing to lay jurors than the concept is to first year law students.

a. "Proximate cause" wording is confusing.

Definitions of "proximate" include:

very near : immediately adjoining . . . soon forthcoming . . . next immediately preceding or following (as in a chain of causes or effects) . . . nearly accurate or correct : **APPROXIMATE** . . . determined by proximate analysis as opposed to ultimate analysis <proximate composition> . . . of a grammatical form : denoting the first of two third persons referred to in a context. "Proximate." *Webster's Third New International Dictionary, Unabridged*. Merriam-Webster, 2002. <http://unabridged.merriam-webster.com> (29 Aug. 2004).

Similarly, synonyms of "proximate" include:

CLOSE . . . immediate, near, near-at-hand, nearby, nigh . . . IMMINENT . . . impending . . . RUDE . . . approximate, rough. "Proximate." *Webster's Collegiate Thesaurus*. Merriam-Webster, 2002. <http://unabridged.merriam-webster.com> (29 Aug. 2004).

In a scholarly study of jury instructions, the "proximate cause" instruction produced proportionally the most misunderstanding among lay persons. The term "proximate cause" was misunderstood as "approximate cause," "estimated cause," or some fabrication. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions* 79 Colum.L.Rev. 1306, 1353 (1979).

In *Mitchell v. Gonzales*, 54 Cal.3d 1041, 1 Cal.Rptr.2d 913, 819 P.2d 872 (1991), the court discussed confusion with "proximate cause" jury instructions as follows:

It is reasonably likely that when jurors hear the term "proximate cause" they may misunderstand its meaning or improperly limit their discussion of what constitutes a cause in fact. Prosser and Keeton's concern that the word "proximate" improperly imputes a spatial or temporal connotation is well founded. Webster's Third New International Dictionary (1981) page 1828, defines proximate as "very near," "next," "immediately preceding or following." Yet, "[p]roximity in point of time or space is no part of the definition [of proximate cause] . . . except as it may afford evidence for or against proximity of causation. [Citation.]" Given the foregoing criticism, it is not surprising that a jury instruction incorporating the term "proximate cause" would come under attack from courts, litigants, and commentators. *Busta v. Columbus Hosp. Corp.*, 916 P.2d 122 (Mont., 1996).

In *John Crane Inc. v. Jones*, 278 Ga. 747, 604 S.E.2d 822 (2004), the Supreme Court of Georgia that it is error to charge that each of multiple defendants must have been a "substantial contributing factor" in causation, as any contributing factor is sufficient. Prior to that decision, plaintiff would have conservatively requested a charge that proximate cause included any "substantial factor" in defining legal or proximate cause. See, e.g., *Whitener v. State*, 201 Ga. App. 309, 410 S.E.2d 796(3) (1991); *Stevens v. Baggett*, 154 Ga.App. 317, 268 S.E.2d 370 (1980); *Perry v. Lyons*, 124 Ga.App. 211, 183 S.E.2d 467 (1971); *Taylor v. Atlanta Gas Light Co.*, 93 Ga. App. 766, 768, 92 S.E.2d 709 (1956). However, in light of the *John Crane Inc. v. Jones* precedent, Plaintiff respectfully requests instruction on the "any contributing factor" standard.

b. "Natural and continuous sequence" clause is confusing.

The pattern charge includes the following language: "the natural and continuous sequence unbroken by other causes where it produces an event and without which the event would not have occurred." Here, "proximate cause" is a singular noun, "it" is a singular pronoun, and "produces" is a singular verb. The grammar does not fit the possibility that more than one person, including both parties and non-parties, may have been significant factors in causing the injury. By requiring that the proximate cause produce an event (injuries) by a "natural and continuous

sequence unbroken by other causes," the pattern charge may lead prevents jurors from considering multiple concurrent proximate causes, particularly if considering passive negligence (which did not "produce" anything – an active verb) and active negligence (thus not "unbroken by other causes").

- c. The Sentence, "proximate cause is that which is nearest in the order of responsible causes as distinguished from remote," is confusing.**

This sentence in the pattern charge also highlights the singularity of the act or event that is the "proximate cause" by using the singular verb "is" twice and identifying it as "that" (the singular relative pronoun, rather than "those") which is "nearest" (only one can be "nearest") in the "order of responsible causes" (some undefined sort of ranking of individual acts or events). The words "nearest" and "remote" highlight the "wrong emphasis upon the factor of physical or mechanical closeness." See *Prosser, supra*.

- d. The pattern charge language defining "proximate cause" as "that which stands last in causation, not necessarily in time or place, but in causal relationship" is confusing and misleading.**

This sentence further describes proximate cause as "that" (the same singular relative pronoun) which

“stands” (singular verb) “last” (only one can be “last”) “in causation” (whatever that means). In apparent recognition of the legal problem that would result from identifying the temporally last cause as the sole proximate cause, the pattern instruction attempts to qualify the act or event in circular fashion, as an act or event that “stands last in causation” as “not necessarily [last] in time or place, but in causal relation.” The purported qualification fails because of circularity and obscurity. It is circular because it defines this type of causation as an undefined kind of causation, and because it is undefined, it must be assumed to be the same sort of causation that “proximate cause” is. It is obscure because the concept of “standing last in causation” apart from “last in space and time” is simply not meaningful English. Plaintiff’s counsel have been unable to find an instance of this usage, even with the help of internet search engines. Even philosophers would have difficulty understanding what “last in causation” but not “last in space or time” could possibly refer to. A lay juror would only hear “last,” and would filter out the rest as legal mumbo jumbo. As a result, the average juror could conclude that the last doctor who treated the patient was “the” proximate cause.

e. The “dominant cause” phrase can no longer be used in defining proximate cause.

In *Thompson v. Thompson*, 278 Ga. 752, 605 S.E.2d 30 (2004), (reversible error to characterize

proximate cause as “dominant cause”), the Supreme Court of Georgia showed its readiness to cast aside confusing language on the doctrine of proximate cause, holding that it was reversible error to instruct the jury that proximate cause is “sometimes called the dominant cause.”

Instructions concerning the “dominant cause” also suggest that there can be only one proximate cause of an injury, as only one can be the “dominant” cause. Prior to *Thompson*, the Court of Appeals had disapproved the “dominant cause” language without finding it reversible. See *Joiner v. Lane*, 235 Ga. App. 121, 122-23(2,c), 508 S.E.2d 203, 206 (1998) (this instruction would have created “a fair risk that the jury would have been confused and misled” in case against a parent for counseling or commanding his son to shoot the plaintiff); *Whitley v. Gwinnett County*, 221 Ga. App. 18, 24(9), 470 S.E.2d 724, 730 (1996) (charge on the proximate cause as the “dominant cause” was “inapt” in a case against a county for failure to maintain the intersection at which the collision occurred); *Locke v. Vonalt*, 189 Ga. App. 783, 788(7), 377 S.E.2d 696, 702 (1989) (disapproving “dominant cause” charge in case by driver of a trailing car against driver of the leading car for contribution after driver of trailing car settled wrongful death claim arising from a head-on collision).

The pattern charge on proximate cause is too confusing to be suitable for a jury in general. A jury’s role in Georgia is simply to decide issues of fact. “[I]t is the province of the jury, in civil cases, to pass upon

questions of fact, and a trial by jury in such cases presupposes an issue of fact; so if there be no such issue, there is nothing for a jury to pass on." *Harry v. Glynn County*, 269 Ga. 503, 505(3), 501 S.E.2d 196 (1998), quoting *Tilley v. Cox*, 119 Ga. 867, 871(2), 47 S.E. 219 (1904). It is emphatically *not* the province of juries to harmonize normative texts; that is the job of the judiciary. Yet, all too often, and particularly with regard to proximate cause instructions, the jury is given an assemblage of snippets from appellate court opinions and essentially asked to make the same coherent sense of them in minutes that judges and lawyers can make only with a long legal education. The idea that a jury will be able to make the correct coherent sense of this compilation of appellate excerpts can only be described as a legal fiction.

To enable the jury to do its job better, the pattern charge should be substantially modified. Clearly, jury instructions do not need to track exactly the language of pattern jury instructions, so long as the charge is a correct statement of the law and not confusing or misleading. *Watkins v. State*, 265 Ga.App. 54, 592 S.E.2d 868 (2004). As was recently demonstrated, the Supreme Court does not shirk from adopting clearer language to improve the jury instructions. See, e.g., *Zwiren v. Thompson*, 276 Ga. 498, 578 S.E.2d 862 (2003). Therefore, the time is now ripe for this court to clarify the pattern instructions on "proximate cause" essentially as set forth in Plaintiff's Request to Charge No. 3.

This 2nd day of March, 2007.

Respectfully submitted,

SHIGLEY LAW
FIRM, LLC

/s/ Kenneth L. Shigley

KENNETH L. SHIGLEY
Georgia Bar No. 642744
Attorney for Plaintiff
(Lead Counsel)

3166 Mathieson Drive, NE,
Suite 200
Atlanta, Georgia
30305-1826
Tel: (404) 364-1999
Fax: (404) 364-0880
E-mail:
ken@shigleylaw.com

LAW OFFICE OF
TOMMY LEE MADDOX

/s/ Tommy Lee Maddox

TOMMY LEE MADDOX
Georgia Bar No. 465514
Attorney for Plaintiff

201 Bombay Lane
Roswell, Georgia 30076
Tel: (678) 762-1632
Fax: (770) 641-6003
E-mail:
tommy@tlmaddox.com

APPENDIX J

**IN THE SUPERIOR COURT OF GORDON COUNTY
STATE OF GEORGIA**

BRENT DEE JOHNSON,

Plaintiff

v.

**CLARENDON NATIONAL
INSURANCE COMPANY,
AMERICAN TRANS-FREIGHT
LLC, ATF TRUCKING, LLC,
ATF LOGISTICS, LLC,
C & C MOTOR FREIGHT, INC.,
ROBERT WESLEY CARNLEY,
ROBERT DARRELL CARNLEY
and COLLEEN CARNLEY,
d/b/a "C & C Freight" or
"C & C Trucking,"**

Defendants.

**PLAINTIFF'S REQUEST TO CHARGE
NO. 30 INTERSTATE SHIPMENT INCLUDED
LEGS OF ROUTE WITHIN ONE STATE**

Members of the jury, I instruct you that the hauling of goods between two points in the same state is part of the interstate shipment of goods if it is part of a shipment to an out-of-state destination.

United States v. Erie R.R. Co., 280 U.S. 98, 102, 50 S.Ct. 51, 53, 74 L.Ed. 187 (1929)

Champlain Realty Co. v. Town of Brattleboro, Vt., 260 U.S. 366, 43 S.Ct. 146, 67 L.Ed. 309 (1922)

- Texas & N.O.R. Co. v. Sabine Tram Co.*, 227 U.S. 111,
33 S.Ct. 229 (1913)
Ohio RR. Com'n v. Worthington, 225 U.S. 101, 32
S.Ct. 653, 56 L.Ed. 1004 (1912)
Johnsen v. Allsup's Convenience Stores, Inc., 119 N.M.
245, 889 P.2d 853, 857 (1995)
(citing *Walling v. Jacksonville Paper Co.*, 317 U.S.
564, 568, 63 S.Ct. 332, 335, 87 L.Ed. 460 (1943))
Bilyou v. Dutchess Beer Distributors, 300 F.3d 217,
224 (2d Cir. 2002)
Foxworthy v. Hiland Dairy Co., 997 F.2d 670, 672
(10th Cir. 1993)
Reich v. American Driver Serv., Inc., 33 F.3d 1153,
1155 n. 3 (9th Cir. 1994)

This 5th day of March, 2007.

Respectfully submitted,

/s/ Kenneth L. Shigley
KENNETH L. SHIGLEY
Attorney for Plaintiff
Georgia Bar No. 642744
SHIGLEY LAW FIRM, LLC
3166 Mathieson Drive,
Suite 200
Atlanta, Georgia 30305
Tel: (404) 364-1999

App. 121

/s/ Tommy Lee Maddox (KLS)
TOMMY LEE MADDOX
Attorney for Plaintiff
Georgia Bar No. 465514
LAW OFFICE OF
TOMMY LEE MADDOX
201 Bombay Lane
Roswell, Georgia 30076
Tel: (678) 762-1632

IN THE SUPERIOR COURT OF GORDON COUNTY
STATE OF GEORGIA

BRENT DEE JOHNSON,

Plaintiff

v.

CLARENDON NATIONAL
INSURANCE COMPANY,
AMERICAN TRANS-FREIGHT
LLC, ATF TRUCKING, LLC,
ATF LOGISTICS, LLC,
C & C MOTOR FREIGHT, INC.,
ROBERT WESLEY CARNLEY,
ROBERT DARRELL CARNLEY
and COLLEEN CARNLEY,
d/b/a "C & C Freight" or
"C & C Trucking,"

CIVIL ACTION FILE
NO. 04-CV-43532

Defendants.

**PLAINTIFF'S REQUEST TO CHARGE
NO. 31 COMMERCIAL MOTOR VEHICLE
IN INTERSTATE COMMERCE**

With regard to all shipments of freight in interstate commerce within the United States, "commercial motor vehicle" is defined to mean "any self-propelled or towed motor vehicle used on a highway in interstate commerce to transport passengers or property when the vehicle" weighs 10,001 pounds or more."

49 C.F.R. § 390.5

App. 123

This 5th day of March, 2007.

Respectfully submitted,

/s/ Kenneth L. Shigley
KENNETH L. SHIGLEY
Attorney for Plaintiff
Georgia Bar No. 642744
SHIGLEY LAW FIRM, LLC
3166 Mathieson Drive,
Suite 200
Atlanta, Georgia 30305
Tel: (404) 364-1999
Fax: (404) 364-0880
E-mail: ken@shigleylaw.com

/s/ Tommy Lee Maddox (KLS)
TOMMY LEE MADDOX
Attorney for Plaintiff
Georgia Bar No. 465514
LAW OFFICE OF
TOMMY LEE MADDOX
201 Bombay Lane
Roswell, Georgia 30076
Tel: (678) 762-1632
Fax: (770) 641-6003
E-mail: tommy@tlmaddox

IN THE SUPERIOR COURT OF GORDON COUNTY
STATE OF GEORGIA

BRENT DEE JOHNSON,

Plaintiff

v.

CLARENDON NATIONAL
INSURANCE COMPANY,
AMERICAN TRANS-FREIGHT
LLC, ATF TRUCKING, LLC,
ATF LOGISTICS, LLC,
C & C MOTOR FREIGHT, INC.,
ROBERT WESLEY CARNLEY,
ROBERT DARRELL CARNLEY
and COLLEEN CARNLEY,
d/b/a "C & C Freight" or
"C & C Trucking,"

CIVIL ACTION FILE
NO. 04-CV-43532

Defendants.

**PLAINTIFF'S REQUEST TO CHARGE
NO. 32 APPLICABILITY OF FEDERAL MOTOR
CARRIER SAFETY REGULATIONS**

Federal Motor Carrier Safety Regulations "are applicable to all employers, employees, and commercial motor vehicles, which transport property or passengers in interstate commerce."

49 C.F.R. § 390.3(a)

This 5th day of March, 2007.

Respectfully submitted,

/s/ Kenneth L. Shigley
KENNETH L. SHIGLEY
Attorney for Plaintiff
Georgia Bar No. 642744
SHIGLEY LAW FIRM, LLC
3166 Mathieson Drive,
Suite 200
Atlanta, Georgia 30305
Tel: (404) 364-1999
Fax: (404) 364-0880
E-mail: ken@shigleylaw.com

/s/ Tommy Lee Maddox (KLS)
TOMMY LEE MADDOX
Attorney for Plaintiff
Georgia Bar No. 465514
LAW OFFICE OF
TOMMY LEE MADDOX
201 Bombay Lane
Roswell, Georgia 30076
Tel: (678) 762-1632
Fax: (770) 641-6003
E-mail: tommy@tlmaddox.com

IN THE SUPERIOR COURT OF GORDON COUNTY
STATE OF GEORGIA

BRENT DEE JOHNSON,

Plaintiff

v.

CLARENDON NATIONAL
INSURANCE COMPANY,
AMERICAN TRANS-FREIGHT
LLC, ATF TRUCKING, LLC,
ATF LOGISTICS, LLC,
C & C MOTOR FREIGHT, INC.,
ROBERT WESLEY CARNLEY,
ROBERT DARRELL CARNLEY
and COLLEEN CARNLEY,
d/b/a "C & C Freight" or
"C & C Trucking,"

CIVIL ACTION FILE
NO. 04-CV-43532

Defendants.

**PLAINTIFF'S REQUEST TO CHARGE
NO. 33 FEDERAL REGULATIONS
REQUIRE WRITTEN TRUCK LEASE**

Federal Motor Carrier Safety Regulations require a certificated interstate motor carrier who leases equipment to enter into a written lease with the equipment owner providing that the carrier-lessee shall have exclusive possession, control, and use of the equipment, and shall assume complete responsibility for the operation of the equipment, for the duration of the lease.

49 C.F.R. §§ 376.11-12

Indiana Refrigerator Lines, Inc. v. Dalton, 516 F.2d
795, 796 (6th Cir.1975)

Toomer v. United Resin Adhesives, Inc., 652 F.Supp.
219, 229 (N.D.Ill.,1986)

This 5th day of March, 2007.

Respectfully submitted,

/s/ Kenneth L. Shigley
KENNETH L. SHIGLEY
Attorney for Plaintiff
Georgia Bar No. 642744
SHIGLEY LAW FIRM, LLC
3166 Mathieson Drive,
Suite 200
Atlanta, Georgia 30305
Tel: (404) 364-1999
Fax: (404) 364-0880
E-mail: ken@shigleylaw.com

/s/ Tommy Lee Maddox (KLS)
TOMMY LEE MADDOX
Attorney for Plaintiff
Georgia Bar No. 465514
LAW OFFICE OF
TOMMY LEE MADDOX
201 Bombay Lane
Roswell, Georgia 30076
Tel: (678) 762-1632
Fax: (770) 641-6003
E-mail: tommy@tlmaddox

IN THE SUPERIOR COURT OF GORDON COUNTY
STATE OF GEORGIA

BRENT DEE JOHNSON,

Plaintiff

v.

CLARENDON NATIONAL
INSURANCE COMPANY,
AMERICAN TRANS-FREIGHT
LLC, ATF TRUCKING, LLC,
ATF LOGISTICS, LLC,
C & C MOTOR FREIGHT, INC.,
ROBERT WESLEY CARNLEY,
ROBERT DARRELL CARNLEY
and COLLEEN CARNLEY,
d/b/a "C & C Freight" or
"C & C Trucking,"

CIVIL ACTION FILE
NO. 04-CV-43532

Defendants.

**PLAINTIFF'S REQUEST TO CHARGE
NO. 34 MOTOR CARRIER IS FINANCIALLY
RESPONSIBLE FOR DRIVERS OF LEASED
COMMERCIAL MOTOR VEHICLE DRIVERS**

Where members of the public are injured by the negligence of the drivers of leased commercial motor vehicles, under federal law the motor carrier is financially responsible to a member of the general public injured by negligence of a driver of its leased commercial motor vehicle.

Judy v. Tri-State Motor Transit Co., 844 F.2d 1496,
1051 (11th Cir. 1988)

Radman v. Jones Motor Co., Inc., 914 F.Supp. 1193,
1198 (W.D.Pa. 1996)

This 5th day of March, 2007.

Respectfully submitted,

/s/ Kenneth L. Shigley
KENNETH L. SHIGLEY
Attorney for Plaintiff
Georgia Bar No. 642744
SHIGLEY LAW FIRM, LLC
3166 Mathieson Drive,
Suite 200
Atlanta, Georgia 30305
Tel: (404) 364-1999
Fax: (404) 364-0880
E-mail: ken@shigleylaw.com

/s/ Tommy Lee Maddox (KLS)
TOMMY LEE MADDUX
Attorney for Plaintiff
Georgia Bar No. 465514
LAW OFFICE OF
TOMMY LEE MADDUX
201 Bombay Lane
Roswell, Georgia 30076
Tel: (678) 762-1632
Fax: (770) 641-6003
E-mail: tommy@tlmaddox.com

IN THE SUPERIOR COURT OF GORDON COUNTY
STATE OF GEORGIA

BRENT DEE JOHNSON,

Plaintiff

v.

CLARENDON NATIONAL
INSURANCE COMPANY,
AMERICAN TRANS-FREIGHT
LLC, ATF TRUCKING, LLC,
ATF LOGISTICS, LLC,
C & C MOTOR FREIGHT, INC.,
ROBERT WESLEY CARNLEY,
ROBERT DARRELL CARNLEY
and COLLEEN CARNLEY,

d/b/a "C & C Freight" or
"C & C Trucking,"

CIVIL ACTION FILE
NO. 04-CV-43532

Defendants.

**PLAINTIFF'S REQUEST TO CHARGE
NO. 35 IF NO COMPLIANCE WITH
MOTOR CARRIER FORMALITIES,
TRUCK LEASE MAY BE IMPLIED**

Where a commercial motor vehicle carries an interstate shipment for an interstate motor carrier without complying with the formality of a required written lease, a lease may be implied to hold the motor carrier responsible for personal injury claims by injured members of the public arising from negligence of the commercial motor vehicle driver.

- Cox v. Bond Transportation, Inc.*, 53 N.J. 186, 249 A.2d 579 (carrier lessee statutorily liable under an oral lease for an accident that occurred while the driver was on his way home), *cert. denied*, 395 U.S. 935, 89 S.Ct. 1999, 23 L.Ed.2d 450 (1969)
- Wilson v. Riley Whittle, Inc.*, 145 Ariz. 317, 321, 701 P.2d 575 (Ct.App.1985) ("the absence of a written trip lease is legally irrelevant")
- Zamalloa v. Hart*, 31 F.3d 911 (9th Cir., 1994)
- Northland Ins. Co. v. Bennett*, 533 N.W.2d 867 (Minn.App.,1995)
- Fuller v. Riedel*, 159 Wis.2d 323, 464 N.W.2d 97 (Ct.App. 1990) (finding statutorily liable a carrier lessee who entered into an oral trip lease and whose sign was not displayed at the time of the accident)

This 5th day of March, 2007.

Respectfully submitted,

/s/ Kenneth L. Shigley
KENNETH L. SHIGLEY
Attorney for Plaintiff
Georgia Bar No. 642744

SHIGLEY LAW FIRM, LLC
3166 Mathieson Drive,
Suite 200
Atlanta, Georgia 30305
Tel: (404) 364-1999

App. 132

/s/ Tommy Lee Maddox (KLS)

TOMMY LEE MADDOX

Attorney for Plaintiff

Georgia Bar No. 465514

LAW OFFICE OF

TOMMY LEE MADDOX

201 Bombay Lane

Roswell, Georgia 30076

Tel: (678) 762-1632

APPENDIX K

**IN THE SUPERIOR COURT OF GORDON COUNTY
STATE OF GEORGIA**

BRENT DEE JOHNSON,

Plaintiff

v.

**CLARENDON NATIONAL
INSURANCE COMPANY,
AMERICAN TRANS-
FREIGHT LLC, ATF
TRUCKING, LLC, ATF
LOGISTICS, LLC, C & C
MOTOR FREIGHT, INC.,
and ROBERT WESLEY
CARNLEY,**

**CIVIL ACTION FILE
NO. 04-CV-43532**

Defendants.

(March 5, 2007)

**David K. Smith
Judge, Superior Court of
Gordon County**

* * *

[504] charge.

MR. SHIGLEY: Number 11.

THE COURT: 11, okay.

MR. SHIGLEY: I was just breaking out the definition.

THE COURT: Are you okay with the way it's defined in number 11, Mr. Fisher?

MR. FISHER: If we scratch out in the interstate motor carrier context just like we did in 9.

MR. SHIGLEY: So combine 10 and 11?

THE COURT: 9 and 11, okay, and I will read them together. Okay. For purposes of this case, and here's my note to myself, read 9 and 11 together. All right. You said you had a note on 10?

MR. FISHER: 10, right, that's argumentative. The first sentence we would object to. Federal Motor Carrier Safety Regulations make the owner/operator of a commercial motor vehicle in interstate commerce a statutory employee of the motor carrier.

MR. SHIGLEY: The next sentence of that charge is supported by the case law by the rules that are cited there.

MR. FISHER: It's argumentative. The first sentence and the last sentence make it argumentative; therefore, interstate motor carriers cannot escape liability by delegating their duties. That's kind of argumentative.

[505] THE COURT: That's more eloquent than anyone in this courtroom. No, I don't mean that, but —

MR. SHIGLEY: Without that sentence, if stricken, is it okay?

MR. FISHER: Strike the first and the last sentence. I think federal regulations do require a carrier lessee to assume legal control and the operator status in relation to motor vehicle –

THE COURT: I would – I mean I think the term statutory employee is important to this case. Mr. Shigley, I'm not real comfortable with saying to the jury, these big federal regulations make the owner/operator a statutory employee. It's confusing. A statutory employee –

MR. SHIGLEY: I think we pick up with the second sentence. Some of the things that – loss for that can be covered in the other charges.

THE COURT: All right. I'm going to take out – go ahead.

MR. FISHER: Here's the key. The lease relationship is the key, and when the statement is the operator's status in relation to the motor carrier, whether he is an independent contractor or employee is irrelevant. What that should read is the relationship of the status of lessee/lessor renders the status of the independent contractor irrelevant. It's not the operator's status that [506] renders it an irrelevant. It's the fact that there is a lessor/lessee relationship that renders the status as an independent contractor irrelevant. I think the correct statement of law can be charged, but we're going to have to work on it.

THE COURT: Well, unless you can – well, take a look at it tonight. I know that's a lot to do.

Unless I am convinced otherwise, I'm going to charge all but the first and last sentence of number 10. Okay, number 11 we've covered. Do you have other exceptions? I know there's one sentence that I'm just not real happy about unless –

THE COURT: Number 23, isn't that last sentence a little bit superfluous?

MR. SHIGLEY: I suppose.

THE COURT: I mean I think you will be able to argue to the jury if old Judge Smith charges that you must have at least 20/40 in both eyes that a person that's blind in one eye is not –

MR. SHIGLEY: I live real close to this because my wife is blind in one eye.

THE COURT: Okay.

MR. SHIGLEY: And she has rear-ended more stuff in the last ten years than I can count.

THE COURT: All right. But I just – I'm going to take that out unless y'all want it in, Mr. Fisher?

[507] MR. FISHER: No.

THE COURT: Didn't think so.

MR. FISHER: Don't like it.

THE COURT: All right.

MR. FISHER: Let's see. We've got an objection on number 14.

THE COURT: Okay. Let's go there.

MR. FISHER: The bottom or the last sentence.

THE COURT: Mr. Shigley?

MR. SHIGLEY: Your Honor, I think that that puts it in context. They've talked a lot about independent contractor status about, you know, the normal things for determining whether somebody is an independent contractor. Other context, and I think to explain that even if he's an independent contractor with regard to taxes or other things that they deal with, that for purposes of federal motor carrier stuff that doesn't apply. I think it just puts it in context.

MR. FISHER: That's what the body of the request says. The written lease makes that status immaterial, but then to say this is required by federal law for protection of the public, that's argument.

MR. SHIGLEY: Or to say this is the rule for protection of the public, even though in other respects.

MR. FISHER: I don't think -- when you start [508] explaining --

THE COURT: Yeah. This is too explanatory. It's not written in the form of a charge. What I'm going to do is this. I'm going to stop it -- I mean I'm going to not read the last sentence, but if you argue it

that way, if you say, you know, I can't read a crystal ball, but I think Judge Smith is going to tell you that blah, blah, blah, blah, blah, I think you can argue that and if Mr. Fisher objects to it, I'll -

MR. SHIGLEY: And I'd have to look at my notes, but I think that the public policy reasoning came from the witness stand, too.

THE COURT: Yeah. Argue what the witness said, then, but I'm just not comfortable charging that last sentence.

MR. FISHER: Let's see. Next on our list is number 16.

THE COURT: Okay.

MR. FISHER: I think it's an inaccurate statement. It says when a commercial motor vehicle carries an interstate shipment, that's not what the law says. What the law says is where a commercial motor vehicle, where one hires the use of a commercial motor vehicle in interstate shipment without complying with the formality of a written lease, one may be implied.

MR. SHIGLEY: I don't have any trouble with that [509] difference in the wording. I will note that the witness, the ATF representative, admitted from the stand that it's his understanding that the lease may be implied from conduct, not just from oral words.

THE COURT: Well, but the witness's understanding of the law does not necessarily mean what I charge –

MR. SHIGLEY: I understand that.

THE COURT: – but you may certainly argue that.

MR. SHIGLEY: The case law certainly says that.

THE COURT: Yeah, but not necessarily in the form of a charge from the bench.

MR. FISHER: That's fine.

THE COURT: So how shall I reword this one? Let me hear your suggestion.

MR. FISHER: Where a commercial motor vehicle is leased in an interstate shipment for an interstate motor carrier without complying with the formality of a written lease, a lease may be implied.

MR. SHIGLEY: By words or conduct.

THE COURT: He wants me to write that one in. I think you're going to – words or conduct. That's at the bottom. That's the last sentence.

MR. SHIGLEY: Yes. The last sentence is mine. It's supported by the case law I've cited.

THE COURT: So I'm just changing the word carries to [510] is leased in an interstate shipment?

MR. FISHER: I'm going to except to that, Judge. I'm going to have to – I mean I could be correct – stand to be corrected. If I take a closer look at those cases, I don't believe that's a correct statement of law.

THE COURT: Okay. Mr. Shigley, you confident on that one?

MR. SHIGLEY: I'm confident on that one, Judge. I beat it to death.

THE COURT: Well, I'll give it a –

MS. SPITALNICK: Which sentence are we looking at? I'm sorry.

MR. FISHER: The last sentence of charge number 16.

MR. SHIGLEY: I would say rather than the full sentence here at the end, to say that – back up in the first sentence – a lease may be implied from words or conduct to hold a motor carrier responsible for injuring members of the public arising from negligence from the motor vehicle driver and then stop it right there.

THE COURT: Is that less objectionable?

MR. FISHER: No. My objection is implying a lease by words or conduct. The lease is only implied under the regs if a lease is in existence but the parties fail to write it.

THE COURT: Well, what I'm going to do over your

* * *

[513] That's where we were yesterday.

MR. FISHER: Yes, Judge. That is the wisest course.

THE COURT: Back on 16.

MR. FISHER: Let's see 16. Well, 16 is an incorrect statement as well, and I think we talked about this yesterday in reference to a commercial motor carrier carrying an interstate shipment for an interstate motor carrier.

THE COURT: I thought we changed it to say where a commercial motor vehicle is leased in an interstate shipment. That's what we did.

MR. FISHER: Okay. Okay. Well, I beg your pardon, then.

THE COURT: And then, second line, a lease may be implied from words or conduct to hold the motor carrier responsible, etcetera, but we end at the end of that sentence. The last sentence is out. That's what my notes say.

MR. FISHER: I think my words, the phrase, or conduct, the statute defines the conduct that can be indicative of a lease. The charge leaves it open and general as if to say any conduct can constitute the basis for an implied lease when the code section specifies what exactly type conduct will.

MR. SHIGLEY: Your Honor, I think that the case law [514] makes it very clear that when they just ignore the formalities, the person they hit on the road is not going to be the victim of their sloppy paperwork.

MS. SPITALNICK: Your Honor, the cases specifically have conduct, the specific conduct in the cases that would state where the implied conduct would come from. It's just not any conduct. There are specific things in the cases where they state out what conduct and where you get an implied lease from that.

MR. SHIGLEY: And we'll agree to disagree on that one.

THE COURT: All right. I'm going to leave it as modified. All right, back to 20. Number 20.

MR. FISHER: Let's see. 20 looks like a definition for freight forwarder. I think that's probably a correct statement.

THE COURT: Okay, 21.

MR. FISHER: 21 is, at best, argumentative, the statement that a freight forwarder is a little more than a travel agent. You know, that -

THE COURT: Mr. Shigley, that doesn't sound like a jury charge.

MR. SHIGLEY: I would agree to take out the travel agent sentence. Just start with the company that arranges to, etcetera.

MR. FISHER: And then, moreover, at the end there [515] where it says, and, therefore, owes the duties of common carrier, I think that, you know, the charge is attempting to rewrite the law. The term forwarder or common carrier is not a phrase that even exists in the code.

MR. SHIGLEY: It exists in the case law, Your Honor.

MS. SPITALNICK: I disagree. It does not.

THE COURT: All right. I need to hear from one.

MS. SPITALNICK: Sorry.

MR. FISHER: Judge, I need all the help I can get.

THE COURT: Well, I understand that and that's why I'm suggesting that you sit down, Mr. Fisher. All right. Y'all do try to consolidate your comments.

MR. SHIGLEY: Your Honor, I think it's an accurate statement of law based on this case law that digs into the depths of the stuff. It may not be necessary in this case, so I'm not going to give them another issue for appeal.

THE COURT: 21 is gone. 22?

MR. FISHER: The first sentence in 22 is an improper statement. The phrase, a motor carrier, should be adjusted to read, any person may be held

liable for negligent hiring of an incompetent independent contractor. And then it should read, if they knew, or by the exercise of reasonable care should have known that the contractor was not competent, would be the cure for that.

MR. SHIGLEY: Well, I'm not sure that any person is an [516] accurate statement here.

THE COURT: Any party.

MR. SHIGLEY: Any party.

THE COURT: That's what I'm going to say.

MR. FISHER: And then going down to, let's see, the third sentence, it says, a company whose core purpose is interstate transportation of property should be corrected to read, a carrier whose core purpose is the —

MR. SHIGLEY: That's fine. I have no objection to that, Judge.

THE COURT: Okay.

MR. FISHER: And then instead, the next sentence, instead of the word hiring, the word leasing should be substituted.

THE COURT: Wait a minute. That is the last sentence.

MR. FISHER: Well, it starts out where we just referenced a company being changed to and then the next line below that begins, on the highways.

THE COURT: Yes.

MR. FISHER: Has a duty to use reasonable care in the leasing of an independent contractor.

THE COURT: Any objection?

MR. SHIGLEY: Your Honor, I think that under this theory, it talks about the hiring of an independent contractor. It doesn't necessarily have to be leasing. We [517] could just stop at a reasonable care.

THE COURT: Any problem with that?

MR. FISHER: Let's see. Let me find that. Okay. That's fine.

MR. SHIGLEY: Or say reasonable care in the engaging the services of an independent trucker.

THE COURT: Engaging?

MR. SHIGLEY: Would that be okay?

THE COURT: That okay?

MR. FISHER: As long as we change trucker to contractor.

MR. SHIGLEY: Okay.

THE COURT: Engaging the services, period.

MR. FISHER: Well, you know, the code says that a carrier can use someone else's equipment only by leasing. It doesn't refer to engaging. I think

I'm going to have to stand on the language of the code.

MR. SHIGLEY: Well, if we say leasing and include the reference to words or conduct, that's not.

THE COURT: What did I say I was going to do about words or conduct. I'm leaving words or conduct in 16.

MR. SHIGLEY: Right.

THE COURT: So I'll change hiring to leasing.

MR. SHIGLEY: Either written or implied from words or conduct.

[518] THE COURT: I'm getting confused here.

MR. SHIGLEY: Okay. You said use reasonable care in leasing or engaging an independent contract by either a written lease or by a lease implied by words or conduct. That work?

MR. FISHER: Well, that doesn't work for me but for the same reasons it didn't work previously.

MR. SHIGLEY: Well, their own corporate representative admitted that it could be done.

MR. FISHER: Well, the corporate representative can't change the code, Judge.

THE COURT: I'm going to leave it vague; reasonable care in engaging the services of an

independent contractor. 23, I think we've already dealt with that. I'm taking out the last sentence, the blind in one eye. 24?

MR. FISHER: We'll object to 24. Public franchise doesn't have any place in this case. It doesn't apply to a broker. For one thing, a broker is not required to operate under public franchise. This reference to restatement second of torts, 4-28, 4-28 has not been adopted in Georgia. There's only one reported case in Georgia jurisprudence that even references it and that case has been reversed. We would object to the charge.

MR. SHIGLEY: Your Honor, this was the - what the courts used prior to 1956 when the statutory employer rule [519] was adopted in order to reach the motor carrier that engaged truck drivers and independent contractors. The only reference to it in Georgia case law was a favorable reference. The reversal of that decision was on unrelated grounds. It's still in restatement. It's still recognized in the Georgia jurisprudence national and I think the reason we don't see it being used a lot is we don't see a lot of this kind of situation where there's still gypsy truckers running.

THE COURT: Is it good law?

MR. SHIGLEY: I think it is.

THE COURT: Are you willing to -

MR. SHIGLEY: Yeah, I'm willing. I think it's still good.

THE COURT: I'm going to leave it in. Your exception is noted. Okay, the next three charges are some negligence per se.

MR. FISHER: Those are fine.

THE COURT: All of them are fine?

MR. FISHER: Well, I think mine might be misnumbered. I've got – is it 25, 26, and 27?

MR. SHIGLEY: Yes.

THE COURT: Yes.

MR. FISHER: Yeah, those are fine. I'm missing 28 and 29.

[520] MR. SHIGLEY: I am, too.

THE COURT: I am, too.

MR. SHIGLEY: I think I must have misnumbered.

THE COURT: These next several, according to the eagle eye of Ms. Huff, our law clerk, these next several are virtually the same as others. Number 30 is virtually the same as number –

MR. SHIGLEY: Given the fact that I was trying to finalize this late at night, I would not rule out the possibility that I did not eliminate every repetition.

THE COURT: Okay. All right. But check me on this. I mean Ms. Huff brought these to my

attention. Number 30 is virtually the same as number 13.

MR. FISHER: As well as 6 and 12.

MR. SHIGLEY: Yeah. I think that I – I think there was one version of this where I had eliminated the duplications and, apparently, that's not the one that I saved and sent over.

THE COURT: Okay. All right. So number 31 is virtually the same is 7. Number 32 is the same as 5. Number 33 is the same as 14. Number 34 is the same as 15. Number 35 is the same as 16. Any comments? I mean whatever I'm going to do with 13, 7, 5, 14, 15, 16 –

MR. SHIGLEY: Your Honor, I have no objections to not charging anything twice.

[521] THE COURT: Mighty big of you.

MR. SHIGLEY: I apologize for the oversight.

THE COURT: Okay, number 36. Mr. Fisher, what do you say?

MR. FISHER: Let's see. Well, I don't think it's proper to spotlight the claim against the insurance carrier in the case.

THE COURT: Why is that necessary for me to charge, Mr. Shigley? I mean they remain as a party.

MR. SHIGLEY: I'm not going to fall on my sword with that.

THE COURT: Yeah. I'm not going to give that one. 37. Guys, I prefer to stick relatively close to the pattern on damages. I mean those are Georgia cases, but I think – well, what do you say, Mr. Fisher?

MR. FISHER: We'd have no problem with the pattern on those.

THE COURT: This is more argumentative.

MR. SHIGLEY: I will point to the pattern on some of theirs as well.

THE COURT: Do what?

MR. SHIGLEY: I will point to the pattern charges on some of theirs as well.

THE COURT: Okay. All right. I know which ones. I'm not going to give 37. I mean I'm adequately going to cover

* * *

[523] MR. FISHER: That's a correct statement.

THE COURT: That's a correct statement of law. I will give that. 31, joint venture.

MR. FISHER: I don't believe that's in the case, Judge.

MR. SHIGLEY: Your Honor, I think the ATF entities wrapped themselves in a joint venture here.

THE COURT: With themselves?

MR. SHIGLEY: Yes. I think if they find against any of them they find against all of them. It's a joint venture. They're all identified jointly in their contract with C&C. There's no separation of management or offices or functions as communicated to anybody else they're dealing with.

THE COURT: But you're not contending that ATF and C&C formed a joint venture?

MR. SHIGLEY: No.

THE COURT: Okay. That's where I thought you were going and I was —

MR. SHIGLEY: I'm not going that far.

THE COURT: Okay.

MR. SHIGLEY: I thought about it, but I'm not.

MR. FISHER: This is essentially a charge piercing the corporate veil, basically.

THE COURT: No, it's not.

[524] MR. FISHER: It's tantamount to it.

MR. SHIGLEY: No, it's not.

MR. FISHER: Directing the jury that they can disregard the separate entities.

MR. SHIGLEY: Your Honor, it looks like the ATF folks disregarded the separate entities in the way they operated.

THE COURT: Well, I'm going to give number 41 except for the last sentence which kind of doesn't apply here.

MR. SHIGLEY: Yeah. I read that one off the computer in a hurry yesterday.

THE COURT: Blame Mr. Maddox for that one.

MR. MADDOX: I get blamed for everything.

THE COURT: I think, yeah, if you were going to want to argue to the jury that there was a joint venture between ATF defendants and C&C, I was not going to allow this, but I think it is permissible. I mean that's the -- no, it's not piercing the corporate veil. I mean I find that, you know, ATF has done absolutely nothing wrong by creating several corporations, but if they've chose to lump themselves together for good purposes, then if they have lumped themselves together, they can be found liable.

MR. FISHER: Well, where is the harm caused to third parties by the negligence of a participant. How is that adjusted to the evidence in the case?

THE COURT: Third parties, I guess. His theory is, [525] well, you answer it.

MR. SHIGLEY: Your Honor, I think that if liability is imputed to any of them as statutory employer, they're all in a joint venture having identified themselves as a motor carrier and this gets past the shell game.

THE COURT: Well, I think the charge is right, neutral, and you know, the charge doesn't use language like shell game.

MR. SHIGLEY: No. That's my language.

THE COURT: Yeah, I know. I know. I'm going to give it, few exceptions noted. I'm not going to give the last sentence. Number 42.

MR. FISHER: Let's see. I don't have a -

THE COURT: Aggravation of preexisting condition.

MR. SHIGLEY: There was some questioning of Dr. Windsor about, you know, any prior stuff with the shoulder or the knee and they had submitted a charge that would seem to argue that you can't recover for anything related to any part of the body that ever had anything wrong with it before, which is not the law.

THE COURT: I'm looking for the pattern charge on -

MR. SHIGLEY: The reason I have a separate aggravation charge in my computer at the office and downloaded it yesterday to present here was the pattern just doesn't cover that.

* * *

[545] a lease written or implied by words or conduct, that was already covered and is inaccurate, but then the last paragraph, of course, is part of the record.

THE COURT: Do you insist on number 30?

MR. FISHER: Yes, Judge.

THE COURT: I'm not going to give number 30. Like I said, Mr. Shigley, if you're real confident.

MR. SHIGLEY: I think what 30 addresses is covered in a more accurate and balanced matter than others have already covered.

THE COURT: 31.

MR. SHIGLEY: This totally ignores the Federal Motor Carrier Safety context of this. It tries to get back to what motor carriers used to do before 1956.

THE COURT: What do you say, Mr. Fisher? I've got a big question mark on this one.

MR. FISHER: Let me see. Well, we would insist on that, Judge. There are several independent contractors in the case, none of whom does the Motor Carrier Regulations apply to, so I think that's adjusted to the facts and needs to be given.

MR. SHIGLEY: Who?

THE COURT: Yeah, who.

MR. FISHER: Both C&C and Logistics, regs don't apply to either one of them. The individual driver is not a [546] motor common carrier either.

MR. SHIGLEY: Because they sent somebody out that wasn't qualified.

MR. FISHER: We're talking about the regs here.

THE COURT: What error am I committing by giving the first paragraph?

MR. SHIGLEY: Your Honor, I think that the first paragraph is given and followed up with the instruction that doesn't apply if we're looking at statutory employer stuff and that's probably okay.

THE COURT: Well, I don't know exactly what order I'm -- I don't know which one I'm going to shove it in in front of or behind, but I'm going to give the first paragraph of number 31. 32.

MR. FISHER: Judge, on 32 and 33, you'd asked for limiting instructions on the contract and the Bill of Lading and that's our attempt to give you something to work with there.

THE COURT: Yeah. What do you say, Mr. Shigley?

MR. SHIGLEY: Your Honor, I think that to give this without also saying that you may consider that as circumstantial evidence in the course of dealing would be misleading and confusing. If you put that in, I think that's fine.

THE COURT: Well, I'm giving a circumstantial evidence [547] charge in general.

MR. SHIGLEY: If you're going to give this, I would say shorten it and just say that that alone is not sufficient to prove, or that alone is not sufficient to establish that ATF had the role of carrier because they didn't prepare it. I think that would shortly and simply limit the -

THE COURT: How about this. I think this will address your concern and still be a proper limiting instruction. Second line; does not establish in and of itself that ATF, etcetera, etcetera. That leaves you room to argue the Court's general charge on circumstantial evidence.

MR. SHIGLEY: I think, you know, if we're just going to have a short limiting instruction on it, the last sentence is not necessary.

THE COURT: I think the last sentence is unnecessary. Do you have a problem with my change there, Mr. Fisher?

MR. FISHER: I'm going to have to insist on what we've submitted here. The cases say that the Bill of Lading is not probative at all and -

THE COURT: But the evidence was that – I mean there was plenty of evidence from the stand as to who prepared or who didn't prepare it, so I'm going to take out the last sentence and add that – substitute that phrase, does not establish in and of itself that ATF Trucking, etcetera.

[548] 33. MR. SHIGLEY: I don't think it's necessary.

THE COURT: Why is it necessary?

MR. FISHER: It's a limiting instruction that you asked us to submit, Judge.

THE COURT: I've slept since then. Not enough. Why did I ask you to do that?

MR. SHIGLEY: And to say it doesn't tend to prove it, it's argumentative and misleading.

MR. MELTON: This is a dangerous charge. I don't think you ought to go there.

MR. SHIGLEY: I'll adopt whatever the professor said.

MR. FISHER: Well, in that case we're going to have to insist on it.

THE COURT: I'm going to decline the charge number 33. All right. Let's see. are there any others that were not submitted in that large packet by ATF? 35.

MR. SHIGLEY: Your Honor, I think we have adequately covered the whole leasing concept in the other charges and to say the jury can't find against ATF unless they did what they were supposed to do or they didn't do what they were supposed to do is inaccurate and misleading.

THE COURT: Well, 35 doesn't say. It's not an argumentative charge. I mean it doesn't say you've got to find such and such.

[549] MR. SHIGLEY: I think the principles here of truck leasing and then the oral or a lease implied by words or conduct we have covered and pretty carefully hammered out language in the other charges and theirs just comes back and then argues their side the way it's not balanced.

THE COURT: Out of an abundance of caution, I'm going to give this. At most, it's surplussage, but what's one more minute in an hour and a half long charge. I'm going to give number 35.

MR. SHIGLEY: I will accept it.

THE COURT: All right, 36.

MR. SHIGLEY: Again, it's naming the parties.

THE COURT: I don't like number 36. I mean you're quoting here. I'm not implying that you're quoting from the CFR, but -

MR. FISHER: Well, I think that's the intent, but I think like ATF Logistics and like C&C

should be deleted and I think the quote – the quote most likely comes from the opinion side of there.

THE COURT: What's wrong with it, Mr. Shigley, if I take out the phrase, like ATF Logistics and like C&C by contrast?

MR. SHIGLEY: I think it's an incomplete statement of law when you start talking about the freight forwarder without referring to the forward common carrier concept [550] where the freight forwarder actually takes responsibility for moving the property in a truck under their control rather than some other common carrier. There I think it's confusing and misleading.

THE COURT: All right. Do you insist on it, Mr. Fisher?

MR. FISHER: Yes, sir.

THE COURT: I'm going to give it. Let's see. Professor Melton, your requests?

MR. MELTON: I'm pretty much down to not much.

THE COURT: We're down to number 1, 2, and 6.

MR. MELTON: I've withdrawn 3, 4, and 5. I'll withdraw 2.

THE COURT: Okay. So we're down to 1. Any objections?

MR. MELTON: 1, 6, and 7 is what we're left with.

THE COURT: Any objections to 1, 6, and 7?

MR. SHIGLEY: None from me.

THE COURT: Mr. Fisher?

MR. FISHER: Let's see. nothing on 1. Judge, 6 is asking the jury to construe a contract, which is -

MR. SHIGLEY: That's what we're trying to avoid for severance and bifurcation and they insisted on they wanted the jury to hear this. They wanted the jury to determine this issue. It is their insistence that bring them here on [551] this.

MR. FISHER: That's not correct. This is not - contract construction is not within the province of the jury, pure and simple.

MR. MELTON: This is not asking the jury to construct the contract.

MR. FISHER: It's asking that the contract be strictly construed against the indemnity.

MR. MELTON: The scrivener, the draftsman.

THE COURT: Well, where's the general pattern charge on contract construction?

MR. SHIGLEY: Your Honor, if they want the Court to construe the contract, I move for severance and bifurcated.

THE COURT: A jury can determine whether or not as a matter of fact a contract has been complied with, but a jury cannot interpret or construe a contract. That's solely within the province of the Court and only if there's an ambiguity within the four corners of the document.

MR. MELTON: Well, the first ambiguity we've got is that it's in the name of a DBA instead of a corporation.

THE COURT: I'm just looking to see if there's a pattern charge on that -

MR. FISHER: I don't believe you'll find one.

THE COURT: I don't believe I'll find one.

MR. MELTON: I don't believe there is a pattern on

* * *

[662] the morning if they want to hear any recharge we'll recharge them. Is that okay?

MR. FISHER: Yes, sir.

THE COURT: Or I'll see if they want to stay a little while longer.

(COURT CONFERRED WITH JURY AT THE JURY ROOM DOOR AT 4:55 P.M.)

THE COURT: I told them that they are – I cannot answer that question. They're to base their verdict on the instructions of the Court only. They wanted to go. They're gone. Nine o'clock in the morning. Y'all come back if you want to.

(Whereupon, court is adjourned until 9:00 A.M. on Friday, March 9th, 2007.)

9:00 A.M.

(DISCUSSION OUTSIDE THE PRESENCE OF THE JURY)

THE COURT: We're on the record. The note says: May we have you recharge the jury in the areas regarding statutory employees and joint ventures, and/or agent. Counsel, do you have any comments about which of the charges meet those requirements or meet those requests?

MR. SHIGLEY: I think the pattern charges on agency and the plaintiff's requests to charge 9, 10, 11, 14, 15, 16 –

[663] THE COURT: Slow down. Slow down.

MR. SHIGLEY: Sorry.

THE COURT: 9?

MR. SHIGLEY: 10, 11, 14, 15, 16, and 41.

THE COURT: Okay. For the defense. Any comments? Agreement? Disagreement? General surliness?

MR. FISHER: We would add to that 28, 31, and 35 of defendants.

THE COURT: Give me those numbers again.

MS. SPITALNICK: 28, 31, and 35, Your Honor.

THE COURT: Thank you.

MR. SHIGLEY: I think their 28 is the same as our 11 if I'm not mistaken.

THE COURT: Yeah, but remember yesterday? I had said defense ATF number 28 is the same as plaintiff's number 11 so —

MR. FISHER: I do remember that.

THE COURT: — I will cross your 28 off. I mean we don't designate to the jury what they are so I will.

MR. SHIGLEY: And to make it flow, I think you had modified their 35 to say should instead of must at the end of the second line.

THE COURT: No, I didn't.

MR. SHIGLEY: You didn't? It should be.

THE COURT: That was never brought up in the charge [664] conference.

MS. SPITALNICK: No, it wasn't.

MR. SHIGLEY: I think if you do their 35 and put our 16 after, it would make it flow.

THE COURT: Well, I don't know that I'm going to reorder them. I mean if I had done your 16 after it the first time I would do it again, but I probably intend to do these in the same order that I did them in the trial. All right. I will start off with the two agency charges from page twenty-eight. Then I will do joint venture, plaintiff 9, plaintiff 11. That's the order that I did them earlier. Plaintiff 10, 14, 15, 16, defendant 31, defendant 35.

MR. SHIGLEY: Your Honor, I think giving their 31 and their 35 repeats all of our written exclusion of conduct twice putting undue emphasis on it, and moreover their 35 instructs the jury that the only way that there can be a lease is either by what they're supposed to do but didn't do or by words and excludes the conduct and puts undue emphasis on the idea that it can only be done the way it's supposed to be done but didn't bother to, which is highly prejudicial to the plaintiff.

THE COURT: Well, which one – I'm going to be giving your 16 which says a lease may be implied from words or conduct.

MR. SHIGLEY: I think the problem probably could be [665] cured by putting 16 after their 35.

THE COURT: What say you?

MR. FISHER: Judge, well, they've been charged already on 31 and want to be recharged. I think it would be necessary to charge both 31 and 35.

THE COURT: Well, I will recharge 31 and 35, but I will move 16, plaintiff's 16, and place it behind your 35. Now I can't find it. Agency, agency, joint venture, plaintiff's 9, 10, - 9, 11, 10, and I had those in that order because employee and employer were in 9 and 11. All right. 41, 9, 11, 10, 13, 15, 14, 15, 16, defendant's 31, defendant's 35, and - All right. I'm lost.

MS. SPITALNICK: 16 should be the last charge.

MR. SHIGLEY: Our 16 should be last.

THE COURT: Plaintiff's 16.

MR. FISHER: Judge, I think, if I can make a suggestion

THE COURT: Yes.

MR. FISHER: Logically, I would think that 35 should follow 16 because 35 is more definitional. 16 just sort of makes a general statement and 35 tends to clarify it.

MR. SHIGLEY: Not really.

THE COURT: I'm going to do 31, 35, 16 in that order. All right. Bring the jury in, please, all thirteen of them.

[666] (END OF DISCUSSION OUTSIDE THE PRESENCE OF THE JURY)

(JURY ENTERS THE COURTROOM AT 10:40 A.M.)

RECHARGE OF THE COURT

THE COURT: Well, good morning, ladies and gentlemen. Good to see y'all this morning. Now that I have you here, I'm going to – I need to go into my office for just a second. I'll be right back. All right. Let's see, where's your client?

MR. SHIGLEY: He was outside and I told him to come back in. I've got to get in touch with him. He's outside.

THE COURT: Okay. Normally, we don't let folks in and out during a jury charge, but I'm not going to ask the jury to wait. When Ms. Seifert – is that her name?

MR. SHIGLEY: Yes, sir.

THE COURT: When Ms. Seifert and Mr. Johnson come in, just let them come on in. All right. Ladies and gentlemen of the jury, I have received your note and shared it with counsel. Let me read it into the record. "May we have you recharge the jury in the areas regarding statutory employees and joint ventures, and/or agent." Ladies and gentlemen, it is a proper request of a jury to be recharged on certain portions of a lengthy jury charge and I will do so. I will do so with this caution, though. The fact that I

am recharging you certain portions of the law does not make these more important to your decision-making process [667] than everything else that I charge. So I am, essentially, recharging everything that I charged yesterday, but I'm not going to read all forty-five minutes of it to you. So I am going to handle those areas that you requested.

I will start with the principles of law dealing with agency. The relation of principle and agent arises whenever one person, expressly or by implication, authorizes another to act for the principle or later approves the acts of another in the principle's behalf. A business entity, such as a corporation, is regarded as a person in this instance. The agent's authority includes all necessary and usual means for performing the agent's duties. Private instructions or limitations not known to persons dealing with the general agent shall not affect them. In specific agencies for a particular purpose, persons dealing with the agent should examine this authority. Joint venture: a joint enterprise or joint venture arises where two or more persons or corporations combine their property or labor or both in a joint undertaking for profit with rights of mutual control over the enterprise provided the arrangement does not establish a partnership. Negligence on the part of one participant in a joint venture or his agent or employee is imputed to all other participants in the joint venture. All joint venture participants are subject to joint liability for any [668] harm caused to third persons by the negligence of any other participant or his agent or

employee during the ordinary course of the joint venture.

Now, ladies and gentlemen, you asked for re-charge on the issues dealing with the concept of statutory employee. Keep in mind that the order that I am charging you might be slightly different than the order that I charged you yesterday. You're not to draw any greater or lesser inference based on the order that these charges come to you. For the purposes of this case, employee means an operator of a commercial motor vehicle, including an independent contractor when operating a commercial motor vehicle: a mechanic, a freight handler, or an individual not an employer who directly affects commercial motor vehicle safety in the course of employment. For purposes of this case employer means a person engaged in a business affecting interstate commerce that owns or leases a commercial motor vehicle in connection with that business or assigns an employee to operate it. Federal regulations require a carrier lessee to assume legal control of the leased vehicle and driver. The operator status in relation to the motor carrier, whether it be as an independent contractor or employee of a carrier, is irrelevant to a person injured by the operator's negligence. An Interstate motor carrier is vicariously liable, as a matter of law, [669] for the negligence of its statutory employee drivers. Any negligence on the part of the driver of the leased vehicle is imputed to the carrier lessee as a matter of law. Federal Motor Carrier Safety Regulations require a certificated interstate motor carrier

who hires the use of a truck from an owner/operator to enter into a written lease with the truck owner providing that the motor carrier shall have exclusive possession, control, and use of the truck and shall assume complete responsibility to the public for the operation of the truck for the duration of the lease. Where a member of the public is injured by the negligence of the driver of leased commercial motor vehicle, under federal law the motor carrier bears responsibility to the injured person for the negligence of the commercial motor vehicle driver. I charge you that one is an independent contractor and not an agent when an employer does not, under the contract, either oral or written, assume the right to control the time, manner, and method of how the independent contractor executes its work.

I charge you that in order for a motor vehicle to be leased by a motor carrier and considered a statutory employee, the lease or arrangement must be made in writing, signed by the parties specifying its duration, and the compensation to be paid by the motor carrier, carry a copy of the arrangement in each motor vehicle to which it [670] applies during the period the arrangement is in effect, inspect the motor vehicle, and have control of and responsible for operating those motor vehicles in compliance with requirements of the law.

I further charge you that a lease can be oral if the carrier dispatches the driver, carrier directs the driver where to pick up the load and where to take the load, the driver represents the carrier by posting

decals of the carrier and the Interstate Commerce Commission number of the carrier on his truck while transporting the load, and the carrier performing a safety inspection of the tractor. Where a commercial motor vehicle is leased in an interstate shipment for an interstate motor carrier without complying with the formality of a written lease, a lease may be implied from words or conduct to hold the motor carrier responsible for injury to members of the public arising from negligence of the commercial motor vehicle driver. All right, ladies and gentlemen, I have recharged those areas of the law that you have requested, but let me re-caution you that you should remember, to the best of your ability, the entire charge that you were charged yesterday afternoon. I will now direct you to go back to the jury room and to the alternate chamber, Mr. English.

(JURY RETIRES TO THE JURY ROOM
AT 10:48 A.M.)

[671] JURY QUESTION NUMBER 1

(Note from Jury)

May we have you re-charge the Jury in the areas regarding Statutory Employee(s) and Joint Ventures and/or Agent?

[672] EXCEPTIONS TO THE RECHARGE

THE COURT: All right. The jury is out of the room. Any exceptions to the recharge for plaintiff?

MR. SHIGLEY: Your Honor, I still think that their number 35 is erroneous, misleading, confusing, and prejudicial.

THE COURT: Okay. I don't recall you raising the must/should objection during our charge conference.

MR. SHIGLEY: The record reflects what I said. I wrote it on my notes, but I don't know if I said it or not.

THE COURT: Okay. Help me out. Did he raise that?

MR. FISHER: I don't believe so, Judge.

MR. MELTON: I don't recall.

MR. SHIGLEY: I know I excepted to the 35.

THE COURT: Yeah, you did. I'm not trying to box you in here. It's just – any exceptions for ATF?

MR. FISHER: No, Judge, other than those already made related to those particular charges, but the recharge was fine.

THE COURT: Certainly. Mr. Melton?

MR. MELTON: As a lawyer involved once said in open court, Your Honor, I stand mute.

App. 172

THE COURT: Yeah. Well, that describes about half the bar up there in Dalton, so. . All right. We'll be at ease. Everybody stick relatively close by. Do we need to

*

*

*



APPENDIX L

**IN THE COURT OF APPEALS
STATE OF GEORGIA**

CLARENDON NATIONAL
INSURANCE COMPANY,
AMERICAN TRANS-FREIGHT LLC,
ATF TRUCKING, LLC, and
ATF LOGISTICS, LLC,

Appellants

DOCKET NO.
A08A0119

vs.

BRENT DEE JOHNSON,

Appellee.

**BRIEF OF APPELLEE
(AMENDED AND CORRECTED)**

(Filed Oct. 12, 2007)

Attorneys for Appellee/Plaintiff:

KENNETH L. SHIGLEY
Georgia Bar No. 642744
SHIGLEY LAW FIRM, LLC
3166 Mathieson Drive, NE,
Suite 200
Atlanta, Georgia 30305-1826
Tel: (404) 364-1999
Fax: (404) 364-0880
E-mail: ken@shigleylaw.com

THOMAS L. MADDOX
Georgia Bar No. 465514
201 Bombay Lane
Roswell, Georgia 30076
Tel: (678) 762-1632
Fax: (770) 641-6003
E-mail: tommy@tlmaddox.com

PART ONE

STATEMENT OF FACTS

Appellants' statement of facts is materially incomplete.

On the morning of August 28, 2003, between Calhoun and Chatsworth, an unmarked, 26,000 pound truck passed on a double yellow line a car stopped at an intersection with a left turn signal flashing, sped through the intersection, and collided with an oncoming pickup operated by Brent Johnson, seriously injuring him. [Vol. 4, T. 24-32, Vol. 5, T. 579, Ex. P-9] The truck with no DOT number [Vol. 4, 385.25-386.2, Vol. 5, T.582, Ex P-12] was hauling a shipment of carpet bound for California under an interstate bill of lading. [Vol. 4, T.76.2-5, 355.22-356.1, Vol. 5, T. 572, Ex. P-2] The truck driver, Robert W. Carnley, was informally hired by C&C Motor Freight, Inc., the local agent of the ATF defendants (American Trans-Freight LLC, ATF Trucking, LLC, and ATF Logistics, LLC), to consolidate freight loads. Neither Carnley nor C&C had any motor carrier authority of their own but operated solely under ATF's authority. [Vol. 4, T. 60.18-20, 75.17-76,1,

90.14-91.6, 100.7-101.25, 363.22-364.3, 392.10-14] Carnley was regularly dispatched by C&C as the agent for ATF to pick up loads from shippers under interstate bills of lading, and was paid informally in cash. [Vol. 4, T. 60.18-20, 84.1-13, 103.22-105.23] Because he was blind in one eye, he did not qualify for, and did not have, a Commercial Drivers License which is required to drive a commercial motor vehicle in interstate commerce. [Vol. 4, T. 70.8-19, 385.17-19]

The contract between ATF and C&C was a "Sales Agency Agreement" [Vol. 5, T. 571, Ex. P-1] which self-identified American Trans-Freight, LLC, ATF Trucking, LLC, and ATF Logistics, LLC, jointly as "ATF," and collectively identified the three entities comprising "ATF" as "a motor carrier in interstate commerce." [Vol. 4, T. 45.4-18, 366.6-11, Vol. 5, 399.12-22, 571, Ex. P-1] It was in a form that ATF had drafted and had used for years, as ATF's corporate representative testified that he "inherited it so someone prior to 1997 in the business guidance for our company put it together." [Vol. 5, T. 410.18-21]

The ATF entities, based in Pennsylvania, are part of a larger conglomerate of transportation companies. [Vol. 5, T. 410.22-411.2] They are indistinguishable in operations, sharing the same office, same president, same CFO, same risk manager, same letterhead, same staff, same agents, same logo, same phone, same fax machine, and same email. [Vol. 5, T. 398.22-7, 400.8-13, 411.3-412.7]

For consolidation of carpet shipments in north-west Georgia, ATF recruited C&C, owned by Robert W. Carnley's father and stepmother. Because C&C had lost its own motor carrier authority due to inability to renew its required insurance, C&C and any drivers it hired operated only under the motor carrier authority of ATF. [Vol. 4, T. 42.8-43.4, 43.10-20, 90.14-91.6, 99.13-15, 100.7-12, 101.23-25, 354.3-23, 356.11-16] Robert W. Carnley attended meetings with his father in which ATF recruited and signed C&C to the agency agreement. [Vol. 4, T. 39.19-41.4, 64.22-65.4, 68.13-14, 80.23-84.13, 388.6-389.1] Subsequently he bought a 26,000 pound truck and regularly used it to haul carpet on the highways at the request of C&C, which operated only as agent for ATF, under interstate bills of lading with no motor carrier authority other than that of ATF. [Vol. 4, T. 64.22-65.4, 103.22-105.10, 363.22-364.3]

ATF required C&C to make "all necessary and customary arrangements" for consolidation of load [Vol. 4, T. 366.20-367.12], and knew that the arrangements its agent C&C made included regularly sending out trucks and driver to pick and deliver loads, and picked up hundreds of loads to consolidate for interstate shipment. [Vol. 4, T. 356.22-357.5, 366.24-367.12, 374.17-25] ATF representatives regularly talked with Colleen Carnley at its agent C&C but never informed the manner of operation violated regulations. [Vol. 4, T. 367.23-368.15] ATF chose not to inform its agent of the rule that shipments bound for a destination in another state are interstate

shipments even on an intrastate leg of the trip, and are therefore always subject to the FMCSR's, and thus failed to require compliance with FMCSR's. [Vol. 4, T. 357.6-13, 367.23-368.15, 374.17-25, 388.6-389.11, Vol. 5, T. 409.20-410.17] ATF also chose not to inform anyone of any distinction of carrier and broker roles between the ATF entities. [Vol 4, T. 358.12-15, 379.20-380.7, Vol. 5, T. 412.12-19, 414.2-4] Neither ATF nor its agent C&C made any effort to require Robert W. Carnley to comply with any motor carrier registration, insurance requirements, safety regulation, CDL requirements, or truck lease formalities. [Vol. 4, T. 367.23-268.15, 374.17-25, 389.2-11, Vol. 5, T. 409.20-410.17] ATF's agent, C&C, was owned by Robert W. Carnley's father and stepmother, with whom he lived, so a jury could infer that ATF's agent knew he was blind in one eye and did not physically qualify for the Commercial Drivers License required in interstate trucking. [Vol. 4, T. 390.9-12]

On August 28, 2003, Robert Carnley was dispatched by ATF's agent, C&C, to pick up an interstate shipment of carpet in Calhoun. The bill of lading showed a destination in California and identified the "carrier" as "C&C/ATF." [Vol. 4, T. 391.22-392.1, 375.8-25, Vol. 5, T. 572, Ex. P-2] Billing for this load was done through ATF, as the billing summary was transmitted to shipper from kbenton@AmericanTransFreight.com [Vol. 4, T. 363.4-12, Vol. 5, T. 573, Ex. P-3].

ATF admitted at trial that any shipment of freight between a consignor in one state and a consignee in another state is an interstate shipment, no matter how it is broken up in different legs of the trip [Vol. 5, T. 401.24-402.11]; that all interstate shipments must be handled under the authority of a certificated motor carrier for protection of the motor-ing public, and there are no exceptions [Vol. 5, T. 402.12-403.17, 408.24-409.5]; and that the definition of motor carrier includes the motor carrier's agents, officers and representatives [Vol. 5, T. 404.19-23], and that brokers are prohibited from representing themselves as carriers. [Vol. 5, T. 406.7-11]

ATF claims that the only ATF entity connected to this shipment was ATF Logistics, LLC, and that it was solely a freight broker. As noted above, ATF's contract identified all three ATF entities jointly as "ATF . . . a motor carrier in interstate commerce." ATF did not reveal to anyone before the crash a distinction in the roles of the entities. [Vol. 4, T. 379.20-380.7]

ATF complains of the foundation and presentation of a claim for attorney fees under O.C.G.A. § 13-6-11, but at trial objected only on grounds that the attorney fee claim must be bifurcated as under O.C.G.A. § 9-15-14 or O.C.G.A. § 9-11-68, and did not object on any grounds relevant to O.C.G.A. § 13-6-11. [Vol. 5, T. 10-12]

There was medical testimony regarding permanent impairment and pain and likelihood of future

medical treatment. [Vol. 4, T. 223.13-228-229.21, 246.9-18]

PART TWO

ARGUMENT AND CITATION OF AUTHORITY

Summary of Argument: Federal Motor Carrier Safety Regulations (FMCSR's) require that interstate shipments by trucks weighing more than 10,000 pounds must be under the authority of an authorized, financially responsible motor carrier. Any freight shipment beginning in one state and ending in another state is an interstate shipment from beginning to end, even on a segment of the trip that is within one state. The FMCSR's create an irrebutable presumption that a truck driver for a motor carrier is a "statutory employee" for whose negligence the carrier is vicariously liable to members of the public, even if the driver is an independent contractor in his business relationship with the carrier. A motor carrier cannot evade responsibility for such a driver by operating informally and failing to execute a lease is required by law. ATF operated as a single enterprise, defining itself jointly as "ATF . . . a motor carrier in interstate commerce," so it cannot now rely upon an unrevealed distinction between carrier and broker roles of its various entities. A freight broker that acts as a carrier bears the duties of a carrier. ATF waived any objections it did not raise at trial. The jury instructions are correct and adjusted to the evidence.

- I. **The evidence and law strongly support vicarious liability of ATF, so the trial court properly denied Appellant ATF's motion for directed verdict.**

The "any evidence" standard applies to appellate review of denial of motions for directed verdict. *F.A.F. Motor Cars v. Childers*, 181 Ga. App. 821 (1987).

- A. **The shipment, from Georgia to California, was an interstate shipment under the Federal Motor Carrier Safety Regulations.**

Where a shipment from one state is destined to another state, it is an "interstate" shipment from beginning to end. See *Atlanta-Asheville Motor Exp. v. Superior Garment Mfg. Co.*, 82 Ga.App. 812 (1950); *American Fidelity & Cas. Co. v. Thompson*, 74 Ga.App. 189 (1946). The hauling of goods between two points in the same state is "part of the interstate movement of goods" if it was "merely one leg of a route to an out-of-state destination." *Bilyou v. Dutchess Beer Distributors*, 300 F.3d 217, 224 (2d Cir. 2002); *Foxworthy v. Hiland Dairy Co.*, 997 F.2d 670, 672 (10th Cir. 1993); *Reich v. American Driver Serv., Inc.*, 33 F.3d 1153, 1155 n. 3 (9th Cir. 1994). Transportation of goods within a single state is "interstate" in character when it forms part of a "practical continuity of movement" across state lines from the point of origin to the final destination. *Johnsen v. Allsup's Convenience Stores, Inc.*, 119 N.M. 245, 889 P.2d 853, 857 (1995) (citing *Walling v. Jacksonville Paper Co.*,

317 U.S. 564, 568, 63 S.Ct. 332, 335, 87 L.Ed. 460 (1943)). The intent at the time transportation commences – such as the shipper's intent in the case to ship carpet from Georgia to California – “fixes the character of the shipment for all the legs of the transport within the United States.” *Project Hope v. M/V Ibn Sina*, 250 F.3d 67, 75 (2d Cir. 2001); *Texas & N.O.R. Co. v. Sabine Tram Co.*, 227 U.S. 111, 122, 33 S.Ct. 229, 233, 57 L.Ed. 442, 447 (1913).

B. The truck was a commercial motor vehicle governed by the Federal Motor Carrier Safety Regulations.

The truck weighed 26,000 pounds and was hauling freight from a shipper in Georgia consigned to a destination in California under an interstate bill of lading. The FMCSR's “are applicable to all employers, employees, and commercial motor vehicles, which transport property or passengers in interstate commerce.” 49 C.F.R. § 390.3(a). A “commercial motor vehicle” is “any self-propelled . . . motor vehicle used on a highway in interstate commerce to transport . . . property when the vehicle weighs 10,001 pounds or more.” 49 C.F.R. § 390.5.

C. The “crushing weight” of authority supports the responsibility of motor carriers for drivers hauling their freight.

ATF asks the Court to roll back the clock more than half a century to gain judicial blessing for a

variation of the type of abuse that the 1956 adoption of the "statutory employer" rule was designed to eliminate. "The crushing weight of authority," *Harvey v. F-B Truck Lines Co.*, 767 F.2d 254 (Idaho 1987), runs directly contrary to ATF's argument, in that at least 98 courts considering the issues from 1941 to 2006, in at least 35 states, have ruled against the position which ATF seeks to advance.¹

1. FMCSR's eliminate the independent contractor defense and create an irrebuttable presumption of vicarious liability.

The FMCSR's, 49 C.F.R. § 390.5 (2002), defines the term "employee" as,

any individual, other than an employer, who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety. Such term includes a *driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle)*, a mechanic, and a freight handler.

The Regulatory Guidance to 49 C.F.R. § 390.5, at Question 17, explains:

¹ See footnotes 2 and 3 in Plaintiff's Trial Memorandum [Vol. 3, R. 1654-1655], citing cases on point from 35 states which are incorporated here by reference.

The term "employee," as defined in § 390.5, *specifically includes an independent contractor employed by a motor carrier*. The existence of operating authority has no bearing upon the issue. *The motor carrier is, therefore, responsible for compliance with the FMCSRs by its driver employees, including those who are owner-operators.*

62 Fed. Reg. 16,407 (April 4, 1997). 49 C.F.R. Chapter III: Regulatory Guidance for the Federal Motor Carrier Safety Regulations, Interpretation to § 390.5, question 17 (1997) (emphasis added). See also 49 C.F.R. § 390.5 (2002).

The regulations "create an irrebuttable presumption of an employment relationship" – statutory employment – "between a driver of a leased vehicle furnished by a contractor-lessor and a carrier-lessee. . . . Any negligence on the part of the driver of the leased vehicle is imputed to the carrier-lessee as a matter of law. The common law doctrines of master-servant, respondeat superior and independent contractor are preempted by these regulations." *Johnson v. S.O.S. Transport*, 926 F.2d 516, n.17 (6th Cir. 1991) (citing *Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems*, 423 U.S. 28, 37, 96 S.Ct. 229, 234, 46 L.Ed.2d 169 (1975); *Judy v. Tri-State Motor Transit Co.*, 844 F.2d 1496, 1051 (11th Cir. 1988)).²

² For additional authorities, see Plaintiff's Trial Memorandum, pp. 10-17 [Vol. 3, R. 1656], which is incorporated here by reference.

The Regulatory Guidance is important because interpretation of a statute or regulation by an administrative agency responsible for enforcement is entitled to great deference unless clearly erroneous. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984); *Sultenfuss v. Snow*, 35 F.3d 1494 (11th Cir. 1994), citing *Hospital Auth. v. State Health Planning Agency*, 211 Ga. App. 407, 408 (1993), *cert. denied* (1994).

2. History, law and public policy support a motor carrier's responsibility for statutory employee drivers.

In 1953, while addressing carriers' evasion of accountability similar to that engaged in by the ATF in this case, the United States Supreme Court described such practices as "evils that had grown up" in the industry, and that the ICC need not "sit idly by and wink at practices that lead to violations of its provisions." *American Trucking Ass'ns v. United States*, 344 U.S. 298, 301, 311 (1953). Those "evils" were summarized in *Rediehs Express, Inc. v. Maple*, 491 N.E.2d 1006 (Ind. Ct. App. 1986):

The history of the regulations of motor carriers reveals that after the commencement of regulation in 1935, . . . a substantial number of carriers . . . began to use equipment owned and driven by truckers who had no such ICC operating authority. This use was accomplished by a variety of leases, trip leases, and

by other arrangements under which owner-operator truckers carried on the operations of the carriers with operating authority. In contracting with such persons the carriers took care to constitute the lessors as independent contractors which enabled them to avoid the commission's safety, financial, and insurance regulations that had been prescribed for equipment and drivers in order to protect the public. Many of the owner-operators without authority were itinerant truckers known as "gypsies," fly-by-night truckers with poor, unsafe equipment who had little financial ability. They may or may not have had adequate insurance. The hard core of the problem was the trip lease and its attendant evils which permitted an indifferent carrier to evade its safety and financial responsibility. . . . The practice of leasing made it difficult in accident cases to fix responsibility, and certified carriers could thus escape the consequences of the regulations and responsibility for accidents by employing irresponsible persons as independent contractors who were not financially accountable and who had no insurance or were under-insured.

As in this case, "the use of non-owned vehicles led to public confusion as to who was financially responsible for accidents caused by those vehicles." *Graham v. Malone Freight Lines, Inc.*, 948 F.Supp. 1124, n.3 (D. Mass. 1996). "The simple fact of the matter is that Congress intended that . . . [a motor] carrier be the insurer of [non-owned trucks] with

respect to the general public." *Radman v. Jones Motor Co., Inc.*, 914 F.Supp. 1193, 1198 (W.D.Pa. 1996). Thus, interstate motor carriers often "were able to escape liability for virtually all motor vehicle accidents occurring in the motor carrier's business." *Cincinnati v. Haack*, 708 N.E.2d 214 (Ohio Ct. App. 1997).

In such cases, it was "clear that the scheme as a whole is a mere subterfuge, an unpermitted evasion, not a real avoidance of the provisions of the law." *Georgia Truck System, Inc. v. Interstate Commerce Commission*, 123 F.2d 210 (5th Cir. 1941), as it was "the motor carrier who has put the entire trip in motion," *American Transit Lines v. Smith*, 246 F.2d 86, 87 (6th Cir. 1957).

The 1956 amendment to the Interstate Common Carrier Act was intended to require a motor carrier to be fully responsible for the maintenance and operation of the leased equipment and the supervision of the borrowed drivers, thereby protecting the public from accidents, preventing public confusion about who was financially responsible if accidents occurred, and providing financially responsible defendants. *Price v. Westmoreland*, 727 F.2d 494 (5th Cir. 1984); *Morris v. JTM Materials*, *supra*. "These are basic requirements that are inherent in the relation of the for-hire carrier to the public. When they are lacking, the chaotic conditions that preceded enactment of the Motor Carrier Act, 1935 inevitably ensue." *Cox v. Bond Transp., Inc.*, 249 A.2d 579 (N.J. 1969). The purpose is "to protect persons who are injured in

highway accidents, by increasing the likelihood that a substantial entity will be available to respond to any judgment rendered." *Johnson v. Pacific Intermountain Express Co.*, 662 S.W.2d 237 (Mo. 1983). This eliminates "the defense of independent contractor by making the owner/operator of the equipment the 'statutory employee' of the carrier." *Shell v. Navajo Freight Lines*, 693 P.2d 382 (Colo. Ct. App. 1984).³

3. A motor carrier cannot exempt itself from vicarious liability by failing to execute a truck lease where one is required.

The definition of "employee" in 49 C.F.R. § 390.5 is not limited to independent contractors who have followed the formality of executing any form of lease agreement, so failure to comply with the lease

³ See also, *Hartford Ins. Co. v. Occidental Fire & Casualty Co.*, 908 F.2d 235 (7th Cir. 1990); *North American Van Lines, Inc. v. Emmons*, 50 S.W.3d 103, 121 (Tex. Ct. App. 2001); *Serna v. Pettey Leach Trucking, Inc.*, 2 Cal. Rptr. 3d 835, 845 (Cal. Ct. App. 2003) (such evasion "just plain wrong"); *Royal Indem. Co. v. Jacobsen*, 863 F.Supp. 1537 (D. Utah 1994) (such an evasion "would defy common sense"); *Toomer v. United Resin Adhesives, Inc.*, 652 F.Supp. 219, 229 (N.D.Ill., 1986) (rule meant to prevent a carrier from "evad[ing] its responsibility to the public by obtaining its trucks through leasing arrangements rather than ownership and employment of drivers"); *Indiana Refrigerator Lines, Inc. v. Dalton*, 516 F.2d 795, 796 (6th Cir.1975) (rule enacted to protect the public by providing it with financially responsible carriers).

requirement cannot excuse a carrier from accountability for casually retained drivers. Under federal regulations and case law the failure to follow the formality of a written agreement between a motor carrier and a driver is not relevant in determining that liability for the driver's negligence is imputed to the motor carrier. "[F]ailure to comply with the regulatory requirements could not relieve the carrier from liability so long as the vehicle was in fact under the control of the carrier." *Zamalloa v. Hart*, 31 F.3d 911 (9th Cir. 1994).⁴ The public policy involved was crystalized by a court that held it could not "expose the public to the indifference of a motor carrier who escapes liability simply because it has either failed to execute a written lease or has not covered the particular activity of the lessor in the written leases." *Rankin v. Fischer*, 441 A.2d 426 (Pa. Super. Ct. 1982).

Where a motor carrier and driver operated informally with no written agreement, and "[n]obody seemed to have the least concern about the total

⁴ See also, *Planet Insurance v. Transport Indemnity*, 823 F.2d 285 (9th Cir. 1987) ("No court has held that a written lease is a condition precedent to imposition of statutory liability on carrier lessees."); *Fuller v. Riedel*, 464 N.W.2d 97 (Wis. Ct. App. 1990) ("The cases are uniform in holding that the absence of a written trip lease is legally irrelevant."); *Wilson v. Riley Whittle, Inc.*, 145 Ariz. 317, 701 P.2d 575 (Ct.App. 1985) ("No court has held that a written lease is a condition precedent to imposition of statutory liability on carrier lessees," and "the absence of a written trip lease is legally irrelevant"); *Ronish v. St. Louis*, 621 F.2d 949 (Mont. Ct. App. 1980) (liability of carrier in absence of a lease).

absence of operating authority," the Missouri Supreme Court held, "This is not a situation in which [the motor carrier] should be allowed to escape liability by asserting independent contractor status. . . . [The carrier's] case is not helped by the fact that it did not try to place the load with a regular, certified carrier, having regular routes and published tariffs, but rather did business with itinerant truckers with no semblance of operating authority." *Johnson v. Pacific Intermountain Express Co.*, 662 S.W.2d 237 (Mo. 1983). See also, *Cheney v. Hailey*, 686 P.2d 808 (Colo. Ct. App. 1984) (agency as matter of law despite failure to observe formality of lease).

D. A broker that represents its operations to be that of a motor carrier may bear the liabilities of a motor carrier.

ATF claims, without contemporaneous supporting evidence, that it cannot be held accountable because only ATF Logistics, LLC was involved with the load on this truck, and then only as a broker. However, 49 C.F.R. § 371.7(b) provides, "A broker shall not, directly or indirectly, represent its operations to be that of a carrier." A broker may be treated as a carrier if it does not delineate the broker role. See, e.g., *KLS Air Express, Inc. v. Cheetah Transp. LLC*, 2007 WL 2428294 (E.D. Cal., 2007).

E. Either a motor carrier or a freight broker may be liable for selection of an unqualified, incompetent contractor.

A motor carrier, defined in 49 C.F.R. § 387.5 to include a motor carrier's agent such as C&C, may be held liable for choosing an incompetent independent contractor. This Court, in *Peachtree-Cain Co. v. McBee*, 254 Ga. 91, (1985) recognized liability for negligent hiring of independent contractor if public policy demands imposition of such a duty. *Restatement (Second) of Torts* § 411 (1965), Comment a, defines a competent and careful contractor as "a contractor who possesses the knowledge, skill, experience, and available equipment which a reasonable man would realize that a contractor must have in order to do the work which he is employed to do without creating unreasonable risk of injury to others." In a trucking context, compliance with licensing, physical qualifications, registration, and insurance requirements are essential to lawful transport of goods on the roadways. A company whose core purpose is the transportation of property on the highways has a duty to use reasonable care in the hiring of an independent trucker including a duty to make an inquiry into that trucker's ability to travel legally on the highways. *Puckrein v. ATI Transport, Inc.*, 186 N.J. 563, 897 A.2d 1034 (N.J., 2006). See also, *Schramm v. Foster*, 341 F.Supp.2d 536, Fed. Carr. Cas. P 84,364 (D. Md. 2004) (negligent hiring claim against freight broker that failed to consider a motor carrier's bad safety record.)

F. An unreasonably risky business that can be performed only under public franchise may bear liability for negligence of its contractor.

Prior to enactment of the "statutory employee" rule, courts relied upon the Restatement rule that, "An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for physical harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity." RESTATEMENT (SECOND) OF TORTS § 428.⁵ While seldom employed in trucking cases today, as the "statutory employer" rule generally covers the issue, it is still good authority.

⁵ See, e.g., *Black v. Montgomery Trucking Co., Inc.*, 129 Ga.App. 36, (followed Restatement rule), reversed on other grounds without mention of either Restatement rule or federal statutes or regulations, 231 Ga. 211 (1973) (compare *Dove v. National Freight, Inc.*, 138 Ga.App. 114 (1976)); *Venuto v. Robinson*, 118 F.2d 679 (3rd Cir., 1941) (Restatement 428 applied to hold interstate motor carrier liable for negligence of independent contractor driver); *Hodges v. Johnson*, 52 F.Supp. 488 (D.C.VA. 1943); *War Emergency Co-op. Ass'n v. Widenhouse*, 169 F.2d 403 (4th Cir. 1948); *Lehman v. Robertson Truck-A-Way*, 122 Cal.App.2d 82, 264 P.2d 653 (Cal.App. 3 Dist. 1953); *Louis v. Youngren*, 12 Ill.App.2d 198, 138 N.E.2d 696 (Ill.App. 1 Dist., 1956); *Eli v. Murphy*, 39 Cal.2d 598, 248 P.2d 756 (Cal., 1952) (nondelegable duty of motor carrier to public).

II. The trial court did not err in denying Appellant's motion for directed verdict on attorney fees and expenses under O.C.G.A. § 13-6-11.

This court "will affirm an award of attorney fees under O.C.G.A. § 13-6-11 if there is any evidence to support it." *Hibbard v. McMillan*, 284 Ga.App. 753 (2007) (Mikell, J.). O.C.G.A. § 9-11-61 provides that "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." The burden is on the party seeking a new trial to show injury as well as error. *Layne v. Rosenfeld*, 122 Ga.App. 839 (1970); *Taylor v. R O A Motors, Inc.*, 114 Ga.App. 671 (1966); *Gaulding v. Courts*, 90 Ga.App. 472 (1954). The ATF defendants have not met that burden.

A. ATF waived any objection to the foundation, amount or value of attorney fees and expenses, or to their reasonable, necessary and customary character.

"A trial objection on a specific ground waives appellate review of other grounds." *Lyons v. State*,

266 Ga.App. 89 (2004) (Smith, J.); *Taylor v. State*, 271 Ga.App. 701 (2005) (Adams, J.) "To preserve a specific point for appellate review, an objection based on that specific ground must be made in the trial court." *Bills v. State*, 283 Ga.App. 660 (2007) (Mikell, J.). Objections concerning attorney fees not made at trial are waived. *Premier Cabinets v. Bulat*, 261 Ga.App. 578, 580(2) (2003).

Perfection is rare in this life, and not required of a trial court. Johnson's undersigned lawyer had a slip of tongue in initially referring to the "stubbornly litigious" rather than "bad faith" prong of O.C.G.A. § 13-6-11. [Vol. 4, T. 298-299] In argument on the motion for directed verdict [Vol. 4, T. 316] and closing argument (which unfortunately was not taken down), argument focused on the "bad faith" prong in relation to violation of FMCSR's.

But ATF objected and moved for mistrial only on the erroneous ground that it was improper to present an attorney fee claim in the case in chief rather than in the second phase of a bifurcated trial [Vol. 4, T. 299.3-300.17], apparently confusing O.C.G.A. § 9-11-68 or O.C.G.A. § 9-15-14 with the older and different procedures under O.C.G.A. § 13-6-11. Ironically, ATF had successfully fought Plaintiff's motion for bifurcation of the main action from ATF's third party claim against C&C and the Carnley, but now complains that the trial should have been bifurcated between claims for compensatory damages and fees and expenses under O.C.G.A. § 13-6-11. See, e.g., *James E. Warren, M.D., P.C. v. Weber & Warren Anesthesia*

Services, LLC, 272 Ga.App. 232 (2005) (Mikell, J.) (failure to preserve issue of apportionment of attorney fees under O.C.G.A. § 13-6-11).

Even if ATF had objected, the court could still consider a contingent fee agreement as evidence of usual and customary attorney fees. *Southern Cellular Telecom v. Banks*, 209 Ga.App. 401 (1993); *Walther v. Multicraft Constr. Co.*, 205 Ga.App. 815, 816(3) (1992). An attorney may testify to, or state in his place, the reasonableness of his contingent attorneys fees. No magic words are required so long as the substance is addressed. *Patton v. Turnage*, 260 Ga.App. 744 (2003). There is no need to base a fee award under O.C.G.A. § 13-16-11 on hours or hourly rates. "The question of an award of attorney fees under O.C.G.A. § 13-6-11 is for the jury." *Daniel v. Smith*, 266 Ga.App. 637, 597 S.E.2d 432 (2004) (Adams, J.).

Even if the slip of tongue in initially referring to "stubborn litigiousness" might have been a valid ground objection, that was negated by ATF choosing not to object on any valid ground. In making only the bifurcation objection only and waiving the opportunity to cross-examine Johnson's counsel or state other grounds of objection, ATF waived any additional objections to the foundation for an award of attorney fees under O.C.G.A. § 13-6-11, to the reasonableness of contingent attorney fees, to the expenses incurred, to the one-third contingent fee, and to the lack of itemization of breakdown of fees between elements of the case.

"Where a motion for a mistrial is made on the ground of inadmissible evidence illegally placed before the jury, the corrective measure to be taken by the trial court is largely a matter of discretion, and where proper corrective measures are taken and there is no abuse of discretion, the refusal of the trial court to grant a mistrial is not error. . . . [Moreover], the denial of a motion for a new trial is also a matter within the sound discretion of the trial court. Accordingly, it will not be disturbed if there is 'any evidence' to authorize it." *Defusco v. Free*, Docket No. A07A1203, decided August 21, 2007 (Mikell, J.). In addition, ATF's counsel was slow to object, and the trial court exercised its discretion to rule that ATF waived the objection by that slowness. [Vol. 4, T. 301.8-304.3] This response was within the sound discretion of the trial judge, was harmless and does not require reversal.

B. A finding of bad faith under O.C.G.A. § 13-641 may be based on evidence of violation of mandatory safety rules.

"Even slight evidence of bad faith can be enough to create an issue for the jury." *Morrison Homes of Florida, Inc. v. Wade*, 266 Ga.App. 598 (2004) (Adams, J.). "The question of bad faith . . . is for the trier of fact to determine." *Monterrey Mexican Restaurant of Wise, Inc. v. Leon*, 282 Ga.App. 439 (2006) (Mikell, J.). "Indicative of whether a party acts in good or bad faith in a given transaction is his abiding by or failing to comply with a public law made for the benefit of

the opposite party, or enacted for the protection of the latter's legal rights. Evidence that appellants failed to comply with mandatory safety regulations promulgated for the benefit of appellees is some evidence that appellants acted in bad faith in the transaction, within the meaning of O.C.G.A. § 13-6-11." *Meyer v. Trux Transp., Inc.*, 2006 WL 3246685 (N.D.Ga., decided Nov. 8, 2006) (FMCSA [sic] violations); *Windermere, Ltd. v. Bettes*, 211 Ga.App. 177 (1993) (landlord's violation of fire exit safety regulations).

Because 49 C.F.R. § 387.5 defines "motor carrier" to include an agent, acts of the agent C&C are acts of the principal ATF. There is evidence of violations of 49 C.F.R. § 390.3(b) (Commercial Driver's License Standards) [Vol. 4, T. 385.17-19], 49 C.F.R. § 391.41 (vision requirements for CDL drivers) [Vol. 4, T. 70.8-19], 49 C.F.R. § 371.7(b) ("A broker shall not, directly or indirectly, represent its operations to be that of a carrier.") [Vol. 4, T. 358.12-15, 364.4-7, 366.6-11, 379.20-380.7, Vol. 5, 399.23-400.13], 49 C.F.R. § 390.11 (motor carrier to require observance of driver regulations) [Vol. 4, T. 367.23-268.15, 374.17-25, Vol. 5, T. 409.20-410.17], 49 C.F.R. § 390.3(e) (knowledge of and compliance with regulations required of motor carriers, drivers and employees) [Vol. 5, T. 409.20-410.14], 49 C.F.R. § 390.13 ("No person shall aid, abet, encourage, or require a motor carrier or its employees to violate the rules of this chapter."). The combined effect of all these FMCSR violations, together with ATF's own words in the "Sales Agency Agreement" that it used as a standard document with its agents

around the country, constitutes circumstantial evidence of the bad faith of the ATF defendants sufficient to support an award of attorney fees and expenses under O.C.G.A. § 13-6-11.

C. ATF's "shell game" defense seeking to evade statutory employer responsibility under the FMCSR's may also support the "stubborn litigiousness" prong of O.C.G.A. § 13-6-11.

While mere refusal to pay a just debt is insufficient to support an award of attorney fees for "stubborn litigiousness" under O.C.G.A. § 13-6-11, "such a refusal may be sufficient when it is not prompted by an honest mistake as to one's rights or duties but by some interested or sinister motive, . . . where the refusal to pay a debt was not made in good faith but was an attempt to defeat the clear intent of the contract. Where no defense exists, a defendant who forces a plaintiff to resort to the courts in order to collect a debt is plainly causing him "unnecessary trouble and expense." *American Computer Technology, Inc. v. Hardwick*, 274 Ga.App. 62 (2005) (Smith, J.). The jury could find that ATF's systematic and determined "shell game" shows an intent prior to suit to evade statutory employer responsibility under clearly established national law and public policy. Thus, there was a basis for "stubborn litigiousness" as well as "bad faith" under O.C.G.A. § 13-6-11.

D. Only one of the three prongs of O.C.G.A. § 13-6-11 is required to support an award of attorney fees.

To authorize recovery for expenses of litigation under O.C.G.A. § 13-6-11, it is only necessary for the plaintiff to show that one of three conditions required by statute dealing with such costs exists. *CSX Transp., Inc. v. West*, 240 Ga.App. 209 (1999).⁶ "Questions concerning bad faith, stubborn litigiousness, and unnecessary trouble and expense under O.C.G.A. § 13-6-11 are generally questions for the jury to decide." *American Med. Trans. Group v. Glo-An*, 235 Ga.App. 464, 467 (1998). An award of attorney fees under O.C.G.A. § 13-6-11 should be affirmed if there is any evidence to support it. *Ga. N'eastern RR Co., Inc. v. Lusk*, 258 Ga.App. 742 (2002).

E. It is permissible to charge the entire statute, as surplusage in a charge is not ground for reversal.

The court charged the jury on the entire statute of O.C.G.A. § 13-6-11. [Vol. 5, T. 409.20-410.14] An

⁶ See also, *National Service Industries, Inc. v. Hartford Acc. & Indem. Co.*, 661 F.2d 458 (1981), rehearing denied 667 F.2d 93; *Vacca v. Meetze*, 499 F.Supp. 1089 (1980); *Carpet Transport, Inc. v. Kenneth Poley Interiors, Inc.*, 219 Ga.App. 556, 466 S.E.2d 70 (1995); *Associated Software Consultants Organization, Inc. v. Wysocki*, 177 Ga.App. 135, 338 S.E.2d 679 (1985); *Ford Motor Co. v. Stubblefield*, 171 Ga.App. 331, 319 S.E.2d 470 (1984); *Altamaha Convalescent Center, Inc. v. Godwin*, 137 Ga.App. 394, 224 S.E.2d 76 (1976).

objection to charging the entire statute rather than tailoring it to only the portion pertinent to the facts is waived if not made at trial. *Foster v. State*, ___ Ga. App. ___(2) (Docket No. A07A0174, decided July 3, 2007) (Mikell, J.). Charging on an entire code section when only a part of it is applicable does not constitute reversible error. *Wyman v. State*, 278 Ga. 339 (2004); *Stevens v. State*, 247 Ga. 698(13) (1981); *Ford v. State*, 232 Ga. 511(12) (1974). There is nothing to indicate that either counsel's slip of tongue or surplusage in charging the entire statute materially affected the outcome, or that the jury would have reached a different result if only the "bad faith" prong of O.C.G.A. § 13-6-11 had been mentioned. Harmless surplusage in a charge does not require reversal.

III. The Sales Agency Agreement and Bill of Lading were properly admitted.

Decisions to admit or exclude evidence including relevant evidence are reviewed for abuse of discretion. *Dept of Transp. v. Mendel*, 237 Ga. App. 900, 902 (2) (1999). Georgia law favors admission of any relevant evidence, no matter how slight its probative value. *Baker v. State*, 246 Ga. 317 (1980). No precise and universal test for relevancy is furnished by the law; the ruling is determined in each instance according to the facts of the particular case and the teachings of reason and judicial experience. *Alexander v. State*, 7 Ga. App. 88 (1909); *Shelnutt v. Phillips*, 113 Ga. App. 321 (1966); *Atlanta Joint Terminals v. Knight*, 98 Ga. App. 482 (1958).

Even slight circumstantial evidence may create a jury question on agency relationships. O.C.G.A. § 24-1-1(4); *Woodmen of the World, Unit No. 3 v. Jordan*, 231 Ga. App. 517(1) (1998); *Williams v. Department of Corrections*, 224 Ga. App. 571 (1997). Similarly, circumstantial evidence is admissible to prove existence of fraud, *Quill v. Newberry*, 238 Ga. App. 184 (1999), a physician-patient relationship, *Walker v. Jack Eckerd Corp.*, 209 Ga. App. 517 (1993), boundary lines, *Christian v. Wahl*, 83 Ga. 395 (1889), and extramarital affairs, *Popham v. Popham*, 278 Ga. 852 (2005) (evidence of Viagra use held relevant to occurrence of extramarital affairs). If circumstantial evidence can prove philandering, fraud, agency, boundary lines, and doctor-patient relationships, it is also admissible to support a relationship between a motor carrier and truck driver.

A. The Sales Agency Agreement was properly admitted as relevant evidence in determining the status and roles of the parties.

The contract in which ATF identified its three entities jointly as "ATF . . . a motor carrier in interstate commerce" was perhaps the most relevant single exhibit in the case against ATF. It was properly admitted to show that the ATF defendants chose to represent themselves jointly as "ATF," to then define "ATF" as "a motor carrier in interstate commerce," and appointed C&C as ATF's agent. Significantly, ATF cites no authority for the proposition that a

contract that defines the relationships between parties cannot be admitted in evidence. Where as in this case the defendant relies upon a contractual indemnity clause for a cross-claim against another defendant, and objects to bifurcating trial of the crossclaim, it waives objection to the contract also being considered as evidence of relationship between the defendants in the plaintiff's injury claim. Moreover, "[a]lthough it is the duty of the trial judge to construe a written contract, still if, instead of doing so, he submits the contract to the jury for construction, the judgment will not be reversed therefor, where it appears that the proper construction would have been adverse to the contention of the complaining party." *Port Wentworth Terminal Corp. v. Leavitt*, 28 Ga.App. 82 (1922). See also, *Lineberger v. Williams*, 195 Ga.App. 186 (1990) (both parties took position that contract was unambiguous in their favor); *Blue Cross of Georgia/Columbus, Inc. v. Whatley*, 180 Ga.App. 93 (1986) (noted without criticism that the "contract itself was available for the jury to review and interpret.")

B. The Bill of Lading was properly admitted as evidence of the interstate shipment and the course of dealing between defendants.

At the time of the crash, the carpet truck operated by Robert Carnley was hauling carpet from Mathews & Parlo in Calhoun, under a bill of lading that consigned it to Big Bob's Carpet in Stockton,

California. Afterward, the carpet ultimately made it to Big Bob's in California on a different truck under the same bill of lading. ATF billed Mathews & Parlo for the entire shipment. The jury could consider the bill of lading as direct evidence of the interstate nature of the shipment and circumstantial evidence of the roles of the parties.

IV. The trial court did not make any reversible error in the jury charge, as the contested charges were accurate statements of law and adequately adjusted to the evidence in the case.

"Where there is any evidence, however slight, upon a particular point, it is not error for the court to charge the law in relation to that issue." *Candler v. Davis & Upchurch*, 204 Ga.App. 167, 170(4c) (1992); *Bennett v. Haley*, 132 Ga.App. 512(1) (1974).

A. "Implied lease" charge.

See discussion of the history, public policy and case law regarding "statutory employee" liability of trucking companies at pages 7 through 14, *supra*.

B. "Public franchise" charge.

See discussion of RESTATEMENT (2D) OF TORTS § 428 at page 16, *supra*.

C. "Joint venture" charge.

As set forth in detail above, the ATF entities chose to identify themselves jointly as "a motor carrier in interstate commerce," and shared the same offices, letterhead, logo, officers, phones, email and agents, without revealing any distinction. There is no question but that the undertaking was for profit. A joint venture exists if two or more entities combine property or labor, or both, in a joint undertaking for profit. *Fulcher's Point Pride Seafood, Inc. v. M/V "Theodora Maria,"* 752 F. Supp. 1068 (S.D. Ga. 1990), *judgment aff'd*, 935 F.2d 208 (11th Cir. 1991); *Accolades Apartments, L.P. v. Fulton County*, 274 Ga. 28 (2001); *Kissun v. Humana, Inc.*, 267 Ga. 419 (1997). A joint venture involves rights of mutual control provided that the arrangement does not establish a partnership. *Accolades Apartments, L.P. v. Fulton County*, 274 Ga. 28 (2001); *Kissun, supra*). The evidence of joint officers, staff, offices and identity, with no distinction made to anyone else as to which entity did what, is sufficient to support a finding of mutual control, and render all joint venturers liable for negligence of the other. *Accolades Apartments, L.P. v. Fulton County*, 274 Ga. 28 (2001); *Kissun, supra*; *Oxley v. Kilpatrick*, 225 Ga. App. 838 (1997), *rev'd in part*, 269 Ga. 82 (1998) and *judgment vacated in part*, 235 Ga. App. 774 (1998). ATF is estopped by the effects of the conduct of its intertwined entities, in favor of third persons, from denying that they are joint venturers even if they never intended to become such. See, e.g. 48A C.J.S. Joint Ventures § 60, Joint

Ventures, Rights and Liabilities as to Third Persons;
12 WILLISTON ON CONTRACTS § 36:9 (4th ed.).

D. "Future medical expense" charge.

In *Massie v. Ross*, 211 Ga.App. 354 (1993), there was testimony that future surgery would likely involve the same type of procedure as previous surgery, and detailed evidence of medical expenses to date, including the cost of her previous surgeries. That was sufficient to authorize the charge on future medical expenses. Brent Johnson presented detailed medical bills as to all past treatment [Vol. 5, T. 588, Ex. P-18], and expert testimony of a physician that the injury caused a permanent impairment [Vol. 4, T. 223.13-228.22], that he will always have to deal with pain [Vol. 4, T. 246.9-18], that it will be necessary to review the status of the rod in the femur at some point in the future, and that costs would be similar if the rod were replaced but less if it were removed without replacement. [Vol. 4, T. 228.25-229.21] That is enough to support a jury instruction on future medical expense.

WHEREFORE, Appellee respectfully prays that the judgment of the Superior Court of Gordon County be AFFIRMED.

This the 11th day of October, 2007, nunc pro tunc
October 9, 2007.

Respectfully submitted,

/s/ Kenneth L. Shigley
KENNETH L. SHIGLEY
Attorney for Appellee
Georgia Bar No. 642744

SHIGLEY LAW FIRM, LLC
3166 Mathieson Drive,
Suite 200
Atlanta, Georgia 30305
Tel: (404) 364-1999
Fax: (404) 364-0880
E-mail: ken@shigleylaw.com

/s/ Tommy Lee Maddox/KLS
TOMMY LEE MADDOX
Attorney for Appellee
Georgia Bar No. 465514

LAW OFFICE OF
TOMMY LEE MADDOX
201 Bombay Lane
Roswell, Georgia 30076
Tel: (678) 762-1632
Fax: (770) 641-6003
E-mail: tommy@tlmaddox.com

IN THE COURT OF APPEALS
STATE OF GEORGIA

CLARENDON NATIONAL
INSURANCE COMPANY,
AMERICAN TRANS-FREIGHT
LLC, ATF TRUCKING, LLC,
and ATF LOGISTICS, LLC,

Appellants

DOCKET NO.
A08A0119

vs.

BRENT DEE JOHNSON,
Appellee.

CERTIFICATE OF SERVICE

This is to certify that I have served opposing counsel in the above-styled matter with a copy of the **Brief of Appellee** (Amended and Corrected) by depositing in the United States Mail a copy of the same, with adequate postage affixed thereon, addressed to the following:

James F. Fisher, II, Esq.
Denise W. Spitalnick, Esq.
W. Scott Henwood, Esq.
Hall, Booth, Smith & Slover, PC
1180 West Peachtree Street, NW
Atlantic Center Plaza, Suite 900
Atlanta, GA 30309-3479

App. 207

This the 11th day of October, 2007.

Respectfully submitted,

/s/ Kenneth L. Shigley
KENNETH L. SHIGLEY
Georgia Bar No. 642744
Attorney for Appellee

SHIGLEY LAW FIRM, LLC
3166 Mathieson Drive, NE, Suite 200
Atlanta, Georgia 30305-1826
Tel: (404) 364-1999
Fax: (404) 364-0880
E-mail: ken@shigleylaw.com

APPENDIX M
IN THE COURT OF APPEALS
STATE OF GEORGIA

CLARENDON NATIONAL
INSURANCE COMPANY,
AMERICAN TRANS-FREIGHT
LLC, ATF TRUCKING, LLC,
and ATF LOGISTICS, LLC,

Appellants

DOCKET NO.
A08A0119

vs.

BRENT DEE JOHNSON,

Appellee.

**APPELLEE'S MOTION FOR RECONSIDERATION
AND INCORPORATED BRIEF**

Attorneys for Appellee:

KENNETH L. SHIGLEY
Georgia Bar No. 642744
SHIGLEY LAW FIRM, LLC
3166 Mathieson Drive, NE,
Suite 200
Atlanta, Georgia 30305-1826
Telephone: (404) 364-1999
Facsimile: (404) 364-0880
E-mail: ken@shigleylaw.com

TOMMY L. MADDON
Georgia Bar No. 465514
201 Bombay Lane
Roswell, Georgia 30076
Telephone: (678) 762-1632
Facsimile: (770) 641-6003
E-mail: tommy@tlmaddox.com

Appellee respectfully moves for reconsideration of the court's decision pursuant to Rule 37, within ten (10) days of the date of the decision, as follows:

1. The court's decision overlooked material facts and overlooked or erroneously construed and misapplied controlling legal authority. It will have profoundly negative national impact on the safety of the traveling public and the economic competitiveness of truckers who try to follow the law. Because of that impact, the Truck Safety Coalition has indicated its desire to be heard as *amicus curiae* when permitted, either upon reconsideration of the court's decision or upon granting of certiorari in the Supreme Court of Georgia.

This court's order is the first known decision by any court in the United States in over half a century approving a motor carrier's use of a "shell game" to exempt itself from accountability for financial responsibility and compliance with motor carrier safety regulations. Under this court's ruling, failure to comply with the law regarding truck leases would excuse a carrier from the requirements of the law, so that scofflaw motor carriers could gain virtual immunity from financial responsibility while undercutting the cost of law-abiding competitors.

If this ruling stands, a motor carrier may avoid all accountability to members of the traveling public under the Federal Motor Carrier Safety Regulations simply by hiring an unmarked truck and unqualified driver and – perhaps with a wink and a nudge – avoiding use of the word "lease" in such an informal arrangement. This court's action already has the

attention of trucking industry.¹ Due to these concerns, officers of the Truck Safety Coalition have expressed the intention, subject to board approval, to submit an *amicus curiae* brief.²

2. The court overlooked material evidence that supports the jury's verdict.

The court correctly referred to the rule that on appeal all evidence must be construed in the light most favorable to the verdict and any doubts or ambiguities must be resolved in favor of supporting the verdict. However, in overlooking evidence that supports the verdict, the court actually did just the opposite.

¹ Appellant's appellate strategy is being directed by Ira S. Lipsius, president of the Central Analysis Bureau (<http://cabfinancial.com/>) and a partner in the New York City law firm of Schindel, Farman, Lipsius, Gardner & Rabinovich, LLP (<http://sfl-legal.com/>), who filed a declaratory judgment action. *Clarendon National Insurance Company v. Harleysville Insurance Company*, Civil Action No. 07-4221, U. S. District Court for the Eastern District of Pennsylvania.

² The **Truck Safety Coalition** is a partnership between the **Citizens for Reliable and Safe Highways (CRASH) Foundation**, and **Parents Against Tired Truckers (P.A.T.T.)**. See <http://www.trucksafety.org>. Other national organizations may also join in *amicus* briefing.

- a. **The court stated that there was no evidence to support the conclusion that Robert Wesley Carnley leased himself or his truck to an ATF defendant for the trip involved in this accident, but overlooked evidence that ATF through its agent C&C did have an arrangement functionally equivalent to a trip lease, whereby it informally hired the truck and driver repeatedly to haul freight under interstate bills of lading consigned to destinations in other states.**

While the word "lease" was not used in the informal arrangement, there was evidence presented to the jury that:

- Because C&C had lost its own motor carrier authority (due to inability to renew its required insurance, though no reference to insurance loss was presented to the jury) C&C and any drivers it hired operated only under the motor carrier authority of ATF. [Vol. 4, T. 42.8-43.4, 43.10-20, 90.14-91.6, 99.13-15, 100.7-12, 101.23-25, 354.3-23, 356.11-16]
- Robert Wesley Carnley attended meetings with his father in which ATF recruited and signed C&C to the agency agreement. [Vol. 4, T. 39.19-41.4, 64.22-65.4, 68.13-14, 80.23-84.13, 388.6-389.1]
- Robert Wesley Carnley then bought a 26,000 pound truck and regularly used it to haul carpet on the highways at the request of C&C, which operated only as agent for ATF,

under interstate bills of lading with no motor carrier authority other than that of ATF. [Vol. 4, T. 64.22-65.4, 103.22-105.10, 363.22-364.3]

- The representative of the ATF entities admitted that the definition of motor carrier includes the motor carrier's agents. [Vol. 5, T. 404.19-23] ATF required C&C to make "all necessary and customary arrangements" for consolidation of freight loads. [Vol. 4, T. 366.20-367.12].
- Those "necessary and customary arrangements" included sending out trucks and drivers to pick hundreds of loads to consolidate for interstate shipment. [Vol. 4, T. 356.22-357.5, 366.24-367.12, 374.17-25]
- Robert Wesley Carnley was regularly dispatched by C&C as the agent for ATF to pick up loads from shippers under interstate bills of lading, hauled under authority of no motor carrier other than ATF, and was paid informally in cash. [Vol. 4, T. 60.18-20, 84.1-13, 103.22-105.23]
- On August 28, 2003, Robert Wesley Carnley was dispatched by ATF's agent, C&C, to pick up a shipment of carpet in Calhoun. The bill of lading showed a destination in California and identified the "carrier" as "C&C/ATF." [Vol. 4, T.391.22-392.1, 375.8-25, Vol. 5, T. 572, Ex. P-2] That note was circumstantial evidence of the course of dealing.

- Billing for this load was done through the joint operation of American Trans-Freight, ATF Trucking and ATF Logistics, as the billing summary was transmitted to shipper from kbenton@AmericanTransFreight.com [Vol. 4, T. 363.4-12, Vol. 5, T. 573, Ex. P-3].

b. The court's decision presumes that ATF Logistics was clearly and undisputably holding itself out as functioning solely as a broker, but the evidence before the jury supports the contrary conclusion.

The court appears to accept at face value ATF's uncorroborated contention that the only ATF entity connected to this shipment was ATF Logistics, LLC, and that it was solely a freight broker. That contention was rejected by the jury which had an opportunity to assess the credibility of the witnesses. The evidence at trial was that:

- The ATF entities – American Trans-Freight, LLC, ATF Trucking, LLC, and ATF Logistics, LLC – chose to identify themselves jointly in the contract with C&C as “ATF,” and collectively identified the three entities comprising “ATF” as “a motor carrier in interstate commerce.” [Vol. 4, T. 45.4-18, 366.6-11, Vol. 5, 399,12-22, 571, Ex. P-1]
- The three ATF entities were indistinguishable in operations, sharing the same office, same president, same CFO, same risk manager, same letterhead, same staff, same agents, same logo, same phone, same fax

machine, and same email. [Vol. 5, T. 398.22-7, 400.8-13, 411.3-412.7]

- The representative for the ATF entities admitted brokers are prohibited from representing themselves as motor carriers. [Vol. 5, T. 406.7-11]
- ATF chose not to inform C&C or anyone else of any distinction of carrier and broker roles between the ATF entities at any time pertinent to this transaction and accident. [Vol. 4, T. 358.12-15, 379.20-380.7, Vol. 5, T. 412.12-19, 414.24]
- There was *no evidence* that ATF had ever communicated to C&C or anyone else that only ATF Logistics was involved, or that it was involved only as a broker, until after suit was filed.

c. The court overlooked evidence sufficient to authorize the verdict that the ATF entities were in a partnership or joint venture.

The court's opinion refers to insufficiency of evidence of a joint venture between ATF and C&C. However, the contention of the Appellee was that there was a joint venture between the three ATF entities. (Brief of Appellee, 27)

- In the contract they drafted and presented to C&C, American Trans-Freight, LLC, ATF Trucking, LLC, and ATF Logistics, LLC, chose to identify themselves jointly as "ATF,"

and referred to the "ATF" entities *in the singular* as "*a* motor carrier in interstate commerce." [Vol. 4, T. 45.4-18, 366.6-11, Vol. 5, 399.12-22, 571, Ex. P-1]

- The three ATF entities were indistinguishable in operations, sharing the same office, same president, same CFO, same risk manager, same letterhead, same staff, same agents, same logo, same phone, same fax machine, and same email. [Vol. 5, T. 398.22-7, 400.8-13, 411.3-412.7].
- ATF did not reveal to anyone before this incident any distinction in the roles of the entities. [Vol. 4, T. 379.20-380.7]
- The jury was authorized to find that they operated jointly as a single enterprise – either a partnership or a joint venture – with no functional distinction between the entities in the course of dealing.

3. The court erroneously construed and misapplied provisions of the Motor Carrier Act and Federal Motor Carrier Safety Regulations.

The seminal case on statutory construction concluded that "the office of all the judges is always to make such construction [as] **to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.**" *Heydon's Case*, 30 Ca. 7a, 76 Eng. Rep. 637

(Exchequer 1584). The language should be given a reasonable, common sense interpretation in the light of the manifest purpose of the legislation. See Sutherland, STATUTORY CONSTRUCTION, '59.06; *U. S. v. Turley*, 352 U.S. 407, 77 S.Ct. 397, 413 (1957); *U.S. v. Bramblett*, 348 U.S. 5013, 509-510 (1955).

Justice Holmes wrote on statutory construction a century ago in *Johnson v. United States*, 163 Fed. 30 (1st Cir. 1908):

A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however, indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.

- a. Even a purely textual construction of the MCA and FMCSR requires inferring a trip lease in the facts of this transaction.³**

The plain meaning of the text of the FMCSR is sufficient to avoid allowing a scofflaw to benefit from failure to comply with the law's requirements.

- i. The court overlooked the purpose clause of 49 C.F.R. § 387.1.**

49 C.F.R. § 387.1 states:

The purpose of these regulations is to create additional incentives to motor carriers to maintain and operate their vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways.

³ The court's decision inaccurately characterized Appellee's position on this issue, stating, "The parties agree that the statutory employer issue in this case centers around whether any ATF defendant leased the truck driven by Wesley Carnley at the time of the accident." However, the brief of Appellee stated: "A motor carrier cannot evade responsibility for such a driver by operating informally and failing to execute a lease . . . required by law," (Brief of Appellee, 6), and "A motor carrier cannot exempt itself from vicarious liability by failing to execute a truck lease where one is required." (Brief of Appellee, 13)

ii. The court overlooked 49 C.F.R. § 390.5, which defines “motor carrier” to include “motor carrier’s agent.”

The FMCSR, at 49 C.F.R. § 390.5, defines “motor carrier” as follows:

Motor carrier means a for-hire motor carrier or a private motor carrier. The term *includes*, but is not limited to, a motor carrier’s agent, officer, or representative; an employee responsible for hiring, supervising, training, assigning, or dispatching a driver; or an employee concerned with the installation, inspection, and maintenance of motor vehicle equipment and/or accessories.

“Agent” is defined in *Webster’s Third New International Dictionary, Unabridged*. (Merriam-Webster, 2002), in pertinent part as follows:

5 : one that acts for or in the place of another by authority from him:

Thus, the plain meaning of the text of 49 C.F.R. § 387.5 is that “motor carrier” includes the “motor carrier’s agent.” With regard to innocent members of the public, any act of the agent regarding the hiring, supervising, training, assigning, or dispatching a driver is an act of the motor carrier, no matter what the internal contractual agreement between the motor carrier and agent may be with regard to responsibility for taxes, workers compensation, indemnification, etc. If C&C failed to perform properly as the agent of ATF, that was a matter for

the cross-claim, in which ATF obtained a judgment against C&C. The risk of that loss should not fall on an innocent motorist injured thereby.

In this case, all three ATF entities jointly represented themselves to be a "motor carrier in interstate commerce" and jointly appointed C&C as their agent authorized to handle "all necessary and customary arrangements," which clearly included hauling freight from shippers to a point of load consolidation. Therefore, an act of C&C in this context – and specifically in "hiring, supervising, training, assigning, or dispatching a driver" – is an act of all three ATF entities which identified themselves jointly as a "motor carrier in interstate commerce."

As discussed above, It is undisputed in the evidence that C&C was an agent of all three ATF entities jointly and could not operate on the roads apart from the motor carrier authority of ATF, and that even ATF admitted that the definition of "motor carrier" includes the motor carrier's agent. [Section 2a, *supra*]

Under 49 C.F.R. § 387.5, C&C was a part of the single enterprise of ATF as a motor carrier in interstate commerce. It acted as a part of the motor carrier as surely as if the dispatcher at C&C were sitting in the office of ATF in Pennsylvania. With regard to taxes, workers compensation, etc., C&C could be an independent contractor in its dealings with the partnership or joint venture of the related ATF entities. However, in relation to any injured member of the

traveling public, C&C must be considered an agent, and therefore under 49 C.F.R. § 390.5 essentially part of ATF.

In a slightly different context, the Supreme Court of Georgia has recognized use of the alter ego theory to facilitate availability of insurance coverage for the business of a motor carrier. *Miller v. Harco Nat. Ins. Co.*, 274 Ga. 387, 392, 552 S.E.2d 848 (2001). Here, the three ATF entities were engaged in a partnership or joint venture in which they jointly represented themselves as a motor carrier in interstate commerce. Under 49 C.F.R. § 387.5, C&C as the agent of ATF is construed to be an alter ego of the motor carrier ATF. Thus, with regard to any member of the traveling public injured by this operation, any act of C&C in selecting and dispatching a driver was an act of all three ATF entities jointly, as all three had jointly represented themselves to be "a motor carrier in interstate commerce." [Vol. 4, T. 45.4-18, 366.6-11, Vol. 5, 399.12-22, 571, Ex. P-1]

- b. The court overlooked 49 C.F.R. § 392.1, which provides that motor carriers and their agents are responsible for management, hiring, supervision, training, assigning and dispatching of commercial motor vehicles and drivers.**

49 C.F.R. § 392.1 requires:

Every motor carrier, its officers, *agents*, representatives, and employees responsible for

the management, maintenance, operation, or driving of commercial motor vehicles, or the hiring, supervising, training, assigning, or dispatching of drivers, *shall be instructed in and comply with the rules* in this part.

Thus, ATF, directly and through its agent C&C, had a duty to manage and instruct so as to assure that it and its agent C&C would hire, supervise, train, assign and dispatch drivers in compliance with the FMCSR. It is undisputed that in this case, it did none of that.

c. The court overlooked 49 C.F.R. 376.2, which defines “lease” to include, in the disjunctive, “contract or arrangement.”

49 C.F.R. § 376.2 includes the following definitions:

(e) Lease – A contract or arrangement in which the owner grants the use of equipment, with or without driver, for a specified period to an authorized carrier for use in the regulated transportation of property, in exchange for compensation.

The alternative and disjunctive reference to “contract or arrangement” must be given some significance other than mere redundancy.

Dictionary definitions of the terms, in pertinent part, include:

contract: 1 a : an agreement between two or more persons or parties to do or not to do

something : . . . 3 : a writing made by the parties to evidence the terms and conditions of a contract.

arrangement: 1 a : the act or action of arranging or putting in correct, convenient, or desired order . . . 2 : the style, manner, or way in which things are arranged . . . 3 : a preliminary step or measure : PREPARATION, PLAN . . . 4 a : a structure or combination of things arranged in a particular way or for a specific purpose : . . . 6 b (1) : a mutual agreement or understanding (as between persons or nations)

Webster's Third New International Dictionary, Unabridged (Merriam-Webster, 2002)

Unless the word "arrangement" is mere surplage with no meaning, one must consider what is the distinction between a "contract" and an "arrangement." "Contract" connotes greater formality and its definition includes reference to writing. "Arrangement" connotes less formality and the definition makes no reference to writing. The use of both words in the disjunctive reflects awareness that in reality there would be situations like this case where, in order to protect the public, the rule would have to be broad enough to reach motor carriers and drivers who do not even make a pretense of any effort to comply with any formalities of documentation or of language.

While 49 C.F.R. § 376.11 requires that a lease be put in writing and include certain specific content, the case law is clear that a lease will be implied in

the absence of a written document.⁴ To determine whether an implied lease arrangement exists, a court examines the totality of the contacts between the parties, in which the parties' subjective beliefs are only part of the analysis that involves consideration of the totality of the contacts between the parties. *Great West Cas. Co. v. Carolina Cas. Ins. Co.*, 2006 WL 1704125 (Minn.App.,2006).

When there is an informal arrangement to hire a commercial motor vehicle (truck over 10,000 pounds) and driver for a trip hauling freight in interstate commerce, with no compliance with anything in the FMCSR, nothing in writing, and no use of the word "lease," who should bear the burden of loss? The motor carrier that allows sloppy, informal practices in hiring trucks and drivers through its designated agent, with no pretense of attempting to comply with

⁴ See, e.g., *Planet Insurance v. Transport Indemnity*, 823 F.2d 285 (9th Cir. 1987) ("No court has held that a written lease is a condition precedent to imposition of statutory liability on carrier lessees."); *Fuller v. Riedel*, 464 N.W.2d 97 (Wis. Ct. App. 1990) ("The cases are uniform in holding that the absence of a written trip lease is legally irrelevant."); *Wilson v. Riley Whittle, Inc.*, 145 Ariz. 317, 701 P.2d 575 (Ct.App. 1985) ("No court has held that a written lease is a condition precedent to imposition of statutory liability on carrier lessees," and "the absence of a written trip lease is legally irrelevant"); *Cheney v. Halley*, 686 P.2d 808 (Colo. Ct. App. 1984) (agency as matter of law despite failure to observe formality of lease); *Johnson v. Pacific Inter-mountain Express Co.*, 662 S.W.2d 237 (Mo. 1983); *Ronish v. St. Louis*, 621 F.2d 949 (Mont. Ct. App. 1980) (liability of carrier in absence of a lease).

any Federal Motor Carrier Safety Regulations? Or the innocent member of the traveling public who is thereby injured?

The motor carrier, which under 49 C.F.R. § 392.1 has a clear duty of management, hiring, supervision, training, assigning and dispatching of commercial motor vehicles and drivers, is in a better position than an innocent motorist on the highway to police its own operations and assure the compliance with the regulations. Any question of fairness to the motor carrier with a sloppy operation that cuts corners and winks at safety rules also raises the question of fairness to the injured member of the traveling public. No one could argue that a motorist driving down the road minding his own business is in a position to protect himself against being struck by an unauthorized truck crossing the center line, which happens to be driven by an unqualified driver informally hired by an interstate motor carrier without the formality of trip lease. The transferring of economic burdens to the innocent injury victim violates fundamental doctrines of tort law. See generally W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *PROSSER AND KEETON ON THE LAW OF TORTS* § 1, at 6 (5th ed. 1984).

Shifting the burden to the innocent victim would also violate the intent of the MCA and FMCSR, as discussed in the next section.

- d. The court erroneously construed provisions of the MCA and FMCSR strictly and narrowly, rather than liberally to fulfill their remedial intent.**

For more than seventy years, the national body of motor carrier case law has overwhelming [sic] held that the MCA, FMCSR and their predecessors are highly remedial and should be liberally interpreted to effect to effect [sic] their purpose to protect innocent members of the traveling public. See, e.g., *I.C.C. v. Interstate Auto Shippers, Inc.*, 214 F.Supp. 473, 476 (S.D.N.Y.1963); *I.C.C. v. Dudgeon*, 213 F.Supp 710, 714 (D.C.Cal.1961) ("The Act being a remedial statute, it should be liberally interpreted to effect its evident purpose."); *Georgia Truck System, Inc. v. I.C.C.*, 123 F.2d 210, (5th Cir.1941); *McDonald v. Thompson*, 305 U.S. 263 (1938); *Piedmont and N. Ry. Co. v. I.C.C.*, 286 U.S. 299, 311 (1931) ("The Transportation Act was remedial legislation, and should therefore be given liberal interpretation.")⁵

⁵ We are aware of criticism of the distinction between "liberal construction" and "strict construction" by some judges and academics. However, the long history of interpreting this statutory and regulatory scheme liberally to effectuate the remedial intent for protection of public safety carries the additional weight of being long established legal precedent

- i. The provisions of the FMCSR in question were intended to protect safety by making motor carriers responsible for all the truckers they use in interstate commerce.**

It is universally accepted that the intent of the MCA and FMCSR lease and statutory employer rules was to address the very evil encountered in this case – the use of unregulated arrangements with fly-by-night truckers with poor, unsafe equipment who had little financial ability and inadequate insurance. Courts across the country have uniformly found that the MCA and FMCSR were designed to stem the very sort of abuse seen in this case – the unregulated use of non-owned vehicles that threatened both public safety and the vitality of the trucking industry. See, e.g., *Integral Ins. Co. v. Lawrence Fulbright Trucking, Inc.*, 930 F.2d 258 (2nd Cir., 1991); *Empire Fire and Marine Ins. Co. v. Guaranty Nat'l Ins. Co.*, 868 F.2d 357, 362 (10th Cir.1989). “[O]ne of the objectives of these regulations was to furnish financially responsible defendants to injured members of the public . . . [and] . . . highway safety must be considered to have been one of the paramount goals.” *Alford v. Major*, 470 F.2d 132 (7th Cir. 1972).

Just as in this case, the old practice of using unregulated and financially incapable “independent” truckers led to public confusion as to who was financially responsible for accidents caused by those vehicles. It was that evil that the rules in question here were intended to remedy. The resulting evil – which

this court's decision will revive – was that interstate motor carriers often “were able to escape liability for virtually all motor vehicle accidents occurring in the motor carrier's business.” See, e.g., *American Trucking Ass'ns v. United States*, 344 U.S. 298, 301, 311 (1953); *Rediehs Express, Inc. v. Maple*, 491 N.E.2d 1006 (Ind. Ct. App. 1986); *Graham v. Malone Freight Lines, Inc.*, 948 F.Supp. 1124, n.3 (D. Mass. 1996).

“The simple fact of the matter is that Congress intended that . . . [a motor] carrier be the insurer of [non-owned trucks] with respect to the general public.” *Radman v. Jones Motor Co., Inc.*, 914 F.Supp. 1193, 1198 (W.D.Pa.1996). The primary goals of the MCA and FMCSR in imposing responsibility on carriers are (1) to prevent motor carriers from avoiding safety standards imposed the FMCSR by the simple practice of leasing equipment from nonregulated carriers; (2) to promote highway safety by insuring that drivers furnished by exempt carriers as part of the lease agreement do not violate safety regulations in the operation of the leased equipment; and (3) to provide shippers and other members of the public with financially responsible carriers. *Indiana Refrigerator Lines, Inc. v. Dalton*, 516 F.2d 795 (6th Cir. 1975).

The intent was to reach all those who are in the business of transporting property by motor vehicle for hire, not exempting those who simply fail to comply with the requirements. See, e.g., *B & C Truck Leasing, Inc. v. I. C. C.*, 283 F.2d 163 (10th Cir. 1960); *I. C. C. v. Interstate Auto Shippers, Inc.*, 214 F.Supp.

473 (S.D.N.Y.1963); *I. C. C. v. Dudgeon*, 213 F.Supp. 710 (S.D.Cal.1961), cert. denied, 372 U.S. 960, 83 S.Ct. 1015, 10 L.Ed.2d 13 (1963).

- ii. The spirit of the MCA & FMCSR, as well as the rule of liberal construction of a remedial statute, requires inferring a lease where one was required to protect the public, despite a motor carrier's non-compliance with the leasing rule.**

Sometimes a legislative body may speak with illustrative particularity when their object is to communicate a general principle or idea. When that occurs, courts should implement the general principle by applying the statutory rule to situations other than those particularly mentioned in the statute, relying on the equity or the spirit of the statute as distinguished from its strictly "literal" meaning. Sutherland, STATUTORY CONSTRUCTION, § 54:1. Where necessary to effectuate the purpose of a provision, a court may infer what is required to supply a deficiency in the statute, consistent with legislative intent. Sutherland, STATUTORY CONSTRUCTION, § 55:3. Thus, where the MCA and FMCSR require a written lease, a motor carrier must not be allowed to dodge accountability by failing to do what it was required to do. Rather, in construing the remedial statute and regulations to effect the remedial purpose, the court should infer existence of the lease that the law

required. Otherwise, scofflaws will be rewarded at the expense of their innocent victims.

- 2. The MCA & FMCSR must be construed to avoid the unreasonable and absurd result of immunizing from accountability a motor carrier that does not fulfill its legal duties, and shifting the burden of loss to an innocent member of the public.**

This court has held that “[i]t is the duty of the court to consider the results and consequences of any proposed construction and not so construe a statute as will result in unreasonable or absurd consequences not contemplated by the legislature.” *Borg-Warner Ins. Fin. Corp. v. Executive Park Ventures*, 198 Ga. App. 70, 400 S.E.2d 340 (1990); *Hoffman v. Doe*, 191 Ga. App. 319, 321, 381 S.E.2d 546 (1989). The result of the court’s decision in this case is unreasonable, as it relies upon semantics rather than substance to authorize the practice that the lease requirement and statutory employer rules of the MCA and FMCSR were designed to prevent.

Other courts have held that written lease is not necessary to invoke the statutory employee status on a driver. See *Wilson v. Riley Whittle, Inc.*, 145 Ariz. 317, 701 P.2d 575 (Ct.App.1985) (“the absence of a written trip lease is legally irrelevant”); *Fuller v. Riedel*, 159 Wis.2d 323, 464 N.W.2d 97 (Ct.App.1990) (finding statutory liability against a carrier lessee who entered into an oral trip lease a question of fact); *Cox v. Bond Transportation, Inc.*, 53 N.J. 186, 249

A.2d 579 (carrier lessee statutorily liable under an oral lease for an accident that occurred while the driver was on his way home), *cert. denied*, 395 U.S. 935, 89 S.Ct. 1999, 23 L.Ed.2d 450 (1969); *Zamalloa v. Hart*, 31 F.3d 911 (9th Cir. 1994) (statutory employer relationship could be formed via oral lease between carrier and owner of truck).

It is absurd and directly contrary to the manifest legislative and regulatory intent and the "equity of the statute" to interpret the MCA and FMCSR in such a narrow and restrictive manner as to immunize from all responsibility a motor carrier that avoids use of a lease that is required, simply because the word "lease" is not used. Such an interpretation stands the law on its head by authorizing the very sort of abuse, but for omission of the word "lease," that the written lease requirement and statutory employer rule were designed to remedy.

a. "Practical control" is sufficient to impose liability in an "arrangement" with a driver even in the absence of a lease.

One of the purposes of the lease requirements now included in the FMCSR was to prevent the type of confusion we have here as to financial responsibility. There is a scarcity of court decisions addressing a situation where a motor carrier used an unlicensed, unqualified driver in an unmarked truck, with no pretense of attempting to comply with any motor carrier safety rules. That may be because few carriers

had the audacity to try that subterfuge, or those who did so were not detected and brought to the bar of justice, or those who were caught did not fight those cases this far.

In *Hogan v. J. Higgins Trucking, Inc.*, 197 S.W.3d 879 (Tex.App. – Dallas, 2006), there was no pretense of a lease on truck driven by an employee of a subcontractor of the motor carrier. Liability was imposed under theory of practical control under state law, which was applied because the driver employed by a subcontractor rather than by an agent which is an alter ego of motor carrier.

Simply because ATF through its agent C&C failed to use the word “lease” in dealings with Robert Wesley Cornley, thereby creating this confusion, ATF should not be allowed to insulate itself from liability where ATF, through its agent C&C, had practical control over Cornley at the time of the collision.

The evidence of repeated use of Mr. Cornley to haul interstate freight loads for ATF through its agent C&C, under the authority of no motor carrier other than ATF, without referring to the arrangement as a lease, is sufficient to create a jury question of an “arrangement” sufficient to imply a lease under 49 C.F.R. § 376.2.

The jury assessed the credibility of the witnesses and weighed the direct and circumstantial evidence which was sufficient to find the existence of an implied lease, and found for the plaintiff. To determine

if the evidence is sufficient to imply a lease arrangement, regardless of the terminology used, a court examines the totality of the contacts between the parties, in which the parties' subjective beliefs are only part of the analysis involving consideration of the totality of the contacts between the parties. *Great West Cas. Co. v. Carolina Cas. Ins. Co.*, 2006 WL 1704125 (Minn.App.,2006); *et cit.*

3. The court overlooked 49 C.F.R. § 371.7(b) which prohibits a broker from representing itself as a motor carrier.

The jury heard and rejected the testimony that only ATF Logistics was involved in this particular transaction, and then only as a broker. That was weighed against the evidence that all three ATF entities jointly represented themselves as a motor carrier in interstate commerce, and that no contemporaneous revelation was made to anyone of any distinction between different roles of different ATF entities.

Even aside from the jury's factual determination on this among other contested issues of fact, 49 C.F.R. § 371.7(b) provides, "A broker shall not, directly or indirectly, represent its operations to be that of a carrier." A broker may be treated as a carrier if it does not delineate the broker role. See, e.g., *KLS Air Express, Inc. v. Cheetah Transp. LLC*, 2007 WL 2428294, Fed. Carr. Cas. P 84,507 (E.D.Cal.,2007). Thus, even if one were to accept at face value the

completely uncorroborated contention that only ATF Logistics was involved, the jury's verdict is supported by the fact that ATF Logistics misrepresented itself as a motor carrier and never in the time frame of this transaction delineated a role as only a broker.

4. The court overlooked RESTATEMENT (SECOND) OF TORTS § 428, which holds the principal liable for negligence of a contractor when an activity can be performed only under franchise from a public authority.

RESTATEMENT (SECOND) OF TORTS § 428 provides that

An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for physical harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity.

Georgia followed this section of the Restatement in *Black v. Montgomery Trucking Co., Inc.*, 129 Ga.App. 36, (followed Restatement rule), reversed on other grounds without mention of either Restatement rule or federal statutes or regulations, 231 Ga. 211 (1973).

Prior to adoption of the statutory employer rule under the FMCSR, this Restatement rule was the means to hold motor carriers accountable for the

negligence of "independent" drivers who hauled for them. While seldom used, it is still good law and should not be ignored in this case.

5. The court erroneously construed and misapplied *McLaine v. Mcleod*, 661 S.E.2d 695 (2008), as there was evidence at trial authorizing the jury to reject the defense contention that only ATF Logistics was involved, and was acting only as a broker, and for the jury to find that ATF was in fact functioning as a motor carrier in interstate commerce.

While both cases involve a truck wreck and use the words "broker" and "motor carrier," that is where the similarity ends. There are six major and material points distinguishing this case from *McLaine*:

- a. **Procedural status.**

In *McLaine*, the Plaintiff appealed from summary judgment in favor of freight broker McLeod d/b/a Container South. Id. There was no evidence in the record that Container South was ever anything other than a pure freight broker. Id. In this case, appellants Clarendon and ATF appealed from a judgment based on a jury verdict. Disputed questions of fact regarding ATF's claim that it functioned as a broker rather than a motor carrier were submitted to, and rejected by, the jury. At trial, there was evidence that the ATF entities jointly identified themselves in

writing as “a motor carrier in interstate commerce,” no evidence whatsoever that ATF ever disclosed to anyone before the litigation any distinction between motor carrier and broker roles, and no contemporaneous evidence that only ATF Logistics or only the broker role was involved at the time of the wreck. The jury was authorized to conclude that the defense that ATF was “just a broker” in this transaction was merely either a business model conceived in bad faith to evade motor carrier responsibility or an evasive and stubbornly litigious strategy conceived after litigation commenced.

b. Definition of defendant’s status in contract.

In *McLaine*, the contract between the freight broker (Container South) and the motor carrier (Kight Trucking) clearly identified Container South as a broker only. *Id.* In this case, the standard form contract drafted by ATF identified all three ATF entities jointly and collectively as “a motor carrier in interstate commerce.” There was nothing in the contract or any contemporaneous evidence to indicate to anyone that only ATF Logistics and not the other ATF entities was involved with this transaction, or that ATF Logistics operated only as a broker. [Vol. 4, T. 367.23-368.15] To the contrary, there was evidence that all the ATF entities were engaged in a partnership or joint venture as a motor carrier, and that if ATF Logistics was a broker it misrepresented itself as a motor carrier in violation of 49 C.F.R. § 371.7(b).

c. Identification of authorized motor carrier.

In *McLaine*, there was no evidence that Container South had any status as a motor carrier or was functioning as motor carrier; it was clearly and exclusively a freight broker. Kight Trucking was motor carrier identified as a motor carrier in the contract with Container South. 661 S.E.2d 695 (2008). Kight Trucking was governed by Federal Motor Carrier Safety Regulations, carried the insurance required by the Federal Motor Carrier Safety Regulations, had a satisfactory safety rating with the U. S. Department of Transportation, had its name and USDOT number were on the door of the truck, and was responsible to traveling public. In sharp contrast, in this case the three ATF entities were jointly and collectively identified as "a motor carrier in interstate commerce." ATF was the only qualified motor carrier associated with the load and responsible to the traveling public at the time of the crash, and the only entity carrying the insurance required of motor carriers under the Federal Motor Carrier Safety Regulations. [Vol. 4, T. 45.4-18, 366.6-11, T. 64.22-65.4, 103.22-105.10, 363.22-364.3, Vol. 5, 399.12-22, 571, Ex. P-1] Neither C&C nor Carnley were qualified as a motor carrier under either state or federal law. With no pretense of independent compliance with Federal Motor Carrier Safety Regulations, C&C was able to operate commercial motor vehicles on the roads only under the motor carrier authority of

ATF. [Vol. 4, T. 42.8-43.4, 43.10-20, 90.14-91.6, 99.13-15, 100.7-12, 101.23-25, 354.3-23, 356.11-16]

d. Qualifications and selection of truck driver.

In *McLaine*, the truck driver had a valid, current Commercial Driver's License (CDL). While he had a history of DUI convictions, they were so far in his past that they did not disqualify him from operating a commercial motor vehicle in interstate commerce under the Federal Motor Carrier Safety Regulations. 661 S.E.2d 695 (2008). In this case, the truck driver was physically disqualified from ever obtaining a CDL because he was blind in one eye. He was selected by ATF, through its contractually designated agent, C&C. "Motor carrier" includes any "agent" of the motor carrier. 49 C.F.R. § 390.5(2)(a). The driver attended meetings between ATF's recruiter and the owner of C&C, at which ATF got C&C to serve as ATF's agent after C&C lost its insurance and motor carrier status. The owner of C&C was the truck driver's father with whom he lived, and who surely knew that he did not have a CDL and was disqualified due to being blind in one eye.

e. Freight on truck at time of crash.

In *McLaine*, the tractor trailer was not loaded at the time of the wreck. The truck driver was on a personal mission to his home in Denton on the evening before he was to pick up a load the next morning

in Ashburn. 661 S.E.2d 695 (2008). In this case, the truck was hauling carpet from a shipper in Calhoun under an interstate bill of lading consigned to a destination in California.

f. Governed by Federal Motor Carrier Safety Regulations.

In *McLaine*, neither the plaintiff/appellants' brief nor the court's opinion cited any authority in the Federal Motor Carrier Safety Regulations (FMCSR). That case was all about extending liability to a pure freight broker beyond anything provided in the FMCSR. In contrast, this case was litigated primarily under the Federal Motor Carrier Safety Regulations governing ATF, which self-identified all of its related entities collectively as "a motor carrier in interstate commerce." Legal theories regarding broker liability were raised only in the alternative in response to ATF's "shell game" defense in which without supporting evidence it claimed that it was wearing only a broker hat in the subject transaction.

WHEREFORE, Appellee respectfully moves that this honorable court reconsider its decision of July 11, 2008, withdraw the decision, and AFFIRM the judgment of the Superior Court of Gordon County.

This the 21st day of July, 2008.

Respectfully submitted,

/s/ Kenneth L. Shigley
KENNETH L.
SHIGLEY
Attorney for Appellee
Georgia Bar No.
642744
SHIGLEY LAW FIRM,
LLC
3166 Mathieson Drive,
Suite 200
Atlanta, Georgia 30305
Tel: (404) 364-1999
Fax: (404) 364-0880
E-mail:
ken@shigleylaw.com

/s/ Tommy Lee Maddox
TOMMY LEE
MADDOX
Attorney for Appellee
Georgia Bar No.
465514
LAW OFFICE OF
TOMMY L. MADDOX
201 Bombay Lane
Roswell, Georgia 30076
Tel: (678) 762-1632
Fax: (770) 641-6003
E-mail:
tommy@tlmaddox.com

IN THE COURT OF APPEALS
STATE OF GEORGIA

CLARENDON NATIONAL
INSURANCE COMPANY,
AMERICAN TRANS-FREIGHT
LLC, ATF TRUCKING, LLC,
and ATF LOGISTICS, LLC,

Appellants

DOCKET NO.
A08A0119

vs.

BRENT DEE JOHNSON,
Appellee.

CERTIFICATE OF SERVICE

This is to certify that I have served opposing counsel in the above-styled matter with a copy of **Appellee's Motion for Reconsideration and Incorporated Brief** by depositing in the United States Mail a copy of the same, with adequate postage affixed thereon, addressed to the following:

James F. Fisher, II, Esq.
Denise W. Spitalnick, Esq.
W. Scott Henwood, Esq.
Hall, Booth, Smith & Slover, PC
1180 West Peachtree Street, NW
Atlantic Center Plaza, Suite 900
Atlanta, GA 30309-3479

App. 241

This the 21st day of July, 2008.

Respectfully submitted,

/s/ Kenneth L. Shigley
KENNETH L. SHIGLEY
Georgia Bar No. 642744
Attorney for Appellee

SHIGLEY LAW FIRM, LLC
3166 Mathieson Drive, NE, Suite 200
Atlanta, Georgia 30305-1826
Tel: (404) 364-1999
Fax: (404) 364-0880
E-mail: ken@shigleylaw.com

APPENDIX N
IN THE SUPREME COURT
STATE OF GEORGIA

BRENT DEE JOHNSON,

Petitioner

vs.

**CLARENDON NATIONAL
INSURANCE COMPANY,
AMERICAN TRANS-FREIGHT
LLC, ATF TRUCKING, LLC,
and ATF LOGISTICS, LLC,**

Supreme Court

Docket No. _____

Court of Appeals

Docket No. A08A0119

Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA**

Attorneys for Petitioner:

NORMAN S. FLETCHER
Georgia Bar No. 264100
Brinson, Askew, Berry,
Seigler, Richardson
and Davis
615 West First Street
P.O. Box 5007
Rome, GA 30162-5007
Phone: 706-291-8853
Fax: 706-234-3574
nsfletcher@brinson-
askew.com

KENNETH L. SHIGLEY
Georgia Bar No. 642744
Shigley Law Firm, LLC
3166 Mathieson Drive, NE,
Suite 200
Atlanta, Georgia
30305-1826
Telephone:
(404) 364-1999
Facsimile:
(404) 364-0880
E-mail:
ken@shigleylaw.com

THOMAS L. MADDOX
Georgia Bar No. 465514
201 Bombay Lane
Roswell, Georgia 30076
Telephone: (678) 762-1632
Facsimile: (770) 641-6003
E-mail: tommy@tlmaddox.com

COMES NOW the Petitioner, BRENT DEE JOHNSON, pursuant to Article VI, § VI, V of the Constitution of the State of Georgia, and Supreme Court Rule 38, and petitions this Court to grant a Writ of Certiorari to review the Court of Appeals decision in this case, issued July 11, 2008. (Exhibit A) On August 1, 2008, the Court of Appeals denied Petitioner's motion for reconsideration. (Exhibit B) This Petition is filed within 20 days of that order.

REASONS FOR GRANTING THE WRIT

This case is of great concern, gravity and importance to the public because:

1. The Court of Appeals decision deprives members of the public in Georgia who are injured by interstate motor carrier operations of the protections that are available to similarly situated persons throughout the United States.
2. The Court of Appeals decision eviscerates key provisions of the Federal Motor Carrier Safety Regulations (FMCSR) through selective, narrow and restrictive construction thereby defeating the

purpose of the regulations, rather than following the rule of the liberal construction which is used throughout the nation to effectuate the remedial purpose of the FMCSR.

3. Contrary to more than half a century of clearly established national public policy, the Court of Appeals has rendered the first known court decision, since the adoption in 1956 of the statutory employee rule for interstate trucking that permits motor carriers to avoid responsibility for damages caused by unqualified truck drivers hauling freight for them in a manner never approved by any other court in the United States.
4. The Court of Appeals decision undermines the national system of motor carrier safety regulation. It subjects law-abiding motor carriers and independent owner-operators to unfair price competition, as it condones the use of noncompliant "independent" truckers hauling freight in interstate commerce without complying with financial responsibility, driver qualification and safety rules under the Federal Motor Carrier Safety Regulations.
5. This court has never addressed how the Federal Motor Carrier Safety Regulations should be construed in Georgia. This case provides the perfect vehicle by which the court can assure that the FMCSR is construed to effect its remedial purpose so that Georgians are protected in the same manner as are citizens of other states.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Jury Verdict & Judgment. A jury in the Superior Court of Gordon County rejected the Respondents' disputed contentions and returned a verdict for a total of \$2,345,940.17 (reduced to \$2,245,940.27 due to an offset) and a verdict for ATF on its crossclaim against its agent C&C Trucking, Inc. in the amount of \$539,566.25. The case arose from a collision that occurred when Robert W. Carnley, hauling interstate freight, drove a commercial truck across the center line and struck Johnson, causing multiple segmented open comminuted fractures of his left femur with malunion resulting in multiple surgeries with implants of intermedullary rods which worked out to protrude into muscle in the hip, related back and knee problems, a 23% permanent impairment to the body as a whole, permanent pain and limp, depression, rage, extreme pain, limitation to sedentary occupations, and loss of ability to work in his home remodeling business and various avocational pursuits. [Vol. 4, T. 142-148, 163-183, 186-191, 193-194, 197-245, 286.22-289, Vol. 5, T. 468.17-471.13, 483.9-484.9]

ATF. Based in Pennsylvania, American Trans-Freight, LLC, ATF Trucking, LLC, and ATF Logistics, LLC are three of the twelve entities in the corporate family of Transport Industries, L.P., which is a wholly owned subsidiary of Transport Industries Holdings, L.P., which in turn is a wholly owned subsidiary of Transport Industries Holdings, Inc. [R. 68, Chart D]

The three ATF entities chose to identify themselves jointly in an agency contract with C&C Trucking (which had no motor carrier authority of its own) as "ATF," and collectively identified the three entities comprising "ATF" as "a motor carrier in interstate commerce." [Vol. 4, T. 45.4-18, 366.6-11, Vol. 5, 399.12-22, 571, Ex. P-1] The three ATF entities were indistinguishable in operations, sharing the same president, CFO, COO, risk manager, letterhead, staff, agents, logo, phone, fax machine, email, same rooms in the same office without distinction, and of course the same agent, C&C. The same designated corporate representative testified on behalf of all three. None of the documentation broke out different roles of different entities, and no such delineation was revealed to others. [Vol. 5, T. 398.22-7, 400.8-13, 411.3-412.19]

ATF's agent, C&C. C&C Trucking, Inc. was a small company owned by the father and stepmother of Robert Wesley Carnley. After losing its motor carrier authority, it was recruited by ATF as an "agent" and thereafter operated exclusively under the motor carrier authority of ATF. [Vol. 5, T. 400.22-25] The representative of the ATF entities admitted that the definition of a motor carrier includes the motor carrier's agents. [Vol. 5, T. 404.19-405.5] ATF required C&C as its agent to make "all necessary and customary arrangements" for consolidation of freight loads, which included hiring and dispatching trucks and drivers to pick hundreds of loads to consolidate for interstate shipment. [Vol. 4, T.356.22-357.5, 366.20-367.12, 374.17-25] C&C and any drivers it

hired operated solely under the motor carrier authority of ATF, and had no authority other than that of ATF to haul freight on the highway. [Vol. 4, T. 42,8-43.4, 43.10-20, 90.14-91.6, 99.13-15, 100.7-12, 101.23-25, 354.3-23, 356.11-16]

The truck driver. Robert Wesley Carnley attended meetings with his father in which ATF recruited and signed C&C to the agency agreement. [Vol. 4, T. 39.19-41.4, 64.22-65.4, 68.13-14, 80.23-84.13, 388.6-389.1] After C&C became the agent of ATF, Carnley bought a 26,000 pound truck which he used many times to haul carpet on the highways at the request of C&C, acting as agent for ATF, under interstate bills of lading with no motor carrier authority other than that of ATF. [Vol. 4, T. 60.18-20, 64.22-65.4, 84.1-13, 103.22-105.23, 363.22-364.3]

The trip. On August 28, 2003, C & C as agent of ATF dispatched Robert Wesley Carnley to pick up a shipment of carpet in Calhoun. C&C and Carnley could haul freight on the roads only under the motor carrier authority of ATF [Vol. 4, T. 42.8-43.4, 43.10-20, 90.14-91.6, 99.13-15, 100.7-12, 101.23-25, 354.3-23, 356.11-16]. The bill of lading showed a destination in California and identified the "carrier" as "C&C/ATF." [Vol. 4, T.391.22-392.1, 375.8-25, Vol. 5, T. 572, Ex. P-2] While not conclusive, that notation was circumstantial evidence of the course of dealing. Billing was done through the joint operation of the three ATF entities, as the billing summary was transmitted to the shipper from kbenton@AmericanTransFreight.com [Vol. 4, T. 363.4-12, Vol. 5, T. 573, Ex. P-3].

In litigation, ATF both attempted to disown its agent C&C with regard to this load and made an uncorroborated defense that only ATF Logistics was involved, and only in the role of a broker. However, the evidence was undisputed that C&C could haul freight only under the authority of ATF and there was no evidence that ATF had ever communicated to anyone that only ATF Logistics was involved with regard to this load, or that it was involved only as a broker. [Vol. 4, T. 358.12-15, 379.20-380.7, Vol. 5, T. 412.12-19, 414.2-4] ATF admitted brokers are prohibited from representing themselves as motor carriers. [Vol. 5, T. 406.7-11] The jury was instructed on credibility of witnesses, the burden of proof, and the definitions of motor carrier, lease, broker, freight forwarder, employer and employee, and by its verdict rejected this defense. [Vol. 5, T. 633-642]

The verdict. After hearing all the evidence on whether all three ATF entities were involved in this transaction as a motor carrier or whether only ATF Logistics, LLC was involved and only as a broker, the jury returned a verdict for Johnson against ATF and Carnley, and in favor of ATF on a crossclaim against C&C for indemnification. The jury was instructed on issues including the Federal Motor Carrier Safety Regulations, principal and agent, commercial motor vehicles, interstate shipments, definitions of "motor carrier," employer, employee, freight forwarder and property broker, vicarious liability of motor carriers, truck leases, implication of leases from words or

actions, negligent hiring of independent contractors, etc. [Vol. 5, T. 634.11-25, 636.10-19, 636.20-642.21]

The Court of Appeals decision. In order to reverse the jury's verdict and the trial court's judgment, the Court of Appeals had to ignore or overlook provisions of the Federal Motor Carrier Safety Regulations, construe other provisions strictly and narrowly rather than liberally to effect their remedial purpose, and construe the evidence not to support the jury's verdict but to abrogate it.

ENUMERATIONS OF ERROR

1. The Court of Appeals erred in permitting an interstate motor carrier to evade responsibility to an injured member of the traveling public, when its agent, which had no motor carrier authority of its own and operated on the roads solely under the authority of the carrier, hired and dispatched an unqualified driver with no motor carrier status and no commercial driver's license, to haul freight for the carrier on the highways in interstate commerce, and that unqualified truck driver caused serious injury to an innocent motorist.
2. The Court of Appeals erred when it usurped the role of the jury, accepting at face value Respondent's uncorroborated contentions, while ignoring evidence sufficient to support the jury's verdict.
3. The Court of Appeals erred in that it misapplied and misconstrued its own decision in *McLaine v. Mcleod*, 661 S.E.2d 695 (2008).

ARGUMENT AND CITATION OF AUTHORITY

I. Construing the Federal Motor Carrier Safety Regulations strictly and narrowly, rather than liberally to effect their remedial purpose, the Court of Appeals ignored or misapplied provisions of the regulations and disregarded the national body of case law decided under the FMCSR regarding the responsibility of motor carriers for their agents and owner-operator drivers.

A. The Court of Appeals ignored 49 C.F.R. § 387.1 which states the purpose of FMCSR to create incentives for safety and to assure that motor carriers maintain an appropriate level of financial responsibility.

49 C.F.R. §§ 387.1 states:

The purpose of these regulations is to create additional incentives to motor carriers to maintain and operate their vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways.

B. The Court of Appeals ignored the heavy weight of case authority that the Federal Motor Carrier Safety Regulations are to be construed liberally to fulfill their remedial intent.

The general rule applied by the Supreme Court of the United States is that safety legislation is to be liberally construed to effectuate the congressional purpose.¹ In accordance with that maxim, for more than seventy years the national body of motor carrier case law has held that the Motor Carrier Act, Federal Motor Carrier Safety Regulations and their predecessors are highly remedial and should be liberally interpreted to effect their purpose to protect innocent members of the traveling public.²

Courts across the country have uniformly found that the "statutory employer" provisions of the FMCSR were designed to stem the very sort of abuse seen in this case – the unregulated use of non-owned

¹ *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13, 100 S.Ct. 883, 63 L.Ed.2d 154 (1980); *U.S. v. Bacto-Unidisk*, 394 U.S. 784, 798, 89 S.Ct. 1410, 1418, 22 L.Ed.2d 762 (1969); *Lilly v. Grand Trunk R. Co.*, 317 U.S. 481, 486, 63 S.Ct. 347, 351, 87 L.Ed. 411 (1943).

² See, e.g., *Piedmont and N. Ry. Co. v. I.C.C.*, 286 U.S. 299, 311 (1931) ("The Transportation Act was remedial legislation, and should therefore be given liberal interpretation."); *Georgia Truck System, Inc. v. I.C.C.*, 123 F.2d 210, (5th Cir.1941); *McDonald v. Thompson*, 305 U.S. 263 (1938); *I.C.C. v. Interstate Auto Shippers, Inc.*, 214 F.Supp. 473, 476 (S.D.N.Y.1963); *I.C.C. v. Dudgeon*, 213 F.Supp 710, 714 (D.C.Cal.1961) ("The Act being a remedial statute, it should be liberally interpreted to effect its evident purpose.").

vehicles that threatened both public safety and the vitality of the trucking industry.³ Just as in this case, the old practice of using unregulated and financially incapable "independent" truckers led to public confusion as to who was financially responsible for accidents caused by those vehicles. It was that evil that the rules in question here were intended to remedy. The resulting evil which this Court of Appeals decision revives – was that interstate motor carriers "were able to escape liability for virtually all motor vehicle accidents occurring in the motor carrier's business."⁴ "[O]ne of the objectives of these regulations was to furnish financially responsible defendants to injured members of the public . . . [and] . . . highway safety must be considered to have been one of the paramount goals."⁵

Congress enacted the [Motor Carrier Act of 1980], in part, to address abuses that had arisen in the interstate trucking industry which threatened public safety, including the use by motor carriers of leased or borrowed vehicles to avoid financial responsibility for accidents that occurred while goods were

³ See, e.g., *Integral Ins. Co. v. Lawrence Fulbright Trucking, Inc.*, 930 F.2d 258 (2d Cir., 1991); *Empire Fire and Marine Ins. Co. v. Guaranty Nat'l Ins. Co.*, 868 F.2d 357, 362 (10th Cir.1989).

⁴ See, e.g., *American Trucking Ass'ns v. United States*, 344 U.S. 298, 301, 311 (1953); *Rediehs Express, Inc. v. Maple*, 491 N.E.2d 1006 (Ind. Ct. App. 1986); *Graham v. Malone Freight Lines, Inc.*, 948 F.Supp. 1124, n.3 (D. Mass. 1996).

⁵ *Alford v. Major*, 470 F.2d 132 (7th Cir. 1972).

being transported in interstate commerce. [Citations.] Accordingly, one remedial measure provided in the [Motor Carrier Act of 1980] is a liability insurance requirement imposed upon each motor carrier registered to engage in interstate commerce.⁶

"The simple fact of the matter is that Congress intended that . . . [a motor] carrier be the insurer of [non-owned trucks] with respect to the general public."⁷ The intent was to reach all those who are in the business of transporting property by motor vehicle for hire, not exempting those who fail to comply with the requirements.⁸

C. The Court of Appeals ignored 49 C.F.R. § 390.5, which defines "motor carrier" to include "a motor carrier's agent."

The Court of Appeals could not reverse the trial court's judgment without ignoring 49 C.F.R. § 390.5, which defines "motor carrier" to include

⁶ *Canal Insurance Co. v. Distribution Services, Inc.*, 320 F.3d 488, 489 (4th Cir. 2003)

⁷ *Radman v. Jones Motor Co., Inc.*, 914 F.Supp. 1193, 1198 (W.D.Pa.1996).

⁸ See, e.g., *B & C Truck Leasing, Inc. v. I. C. C.*, 283 F.2d 163 (10th Cir. 1960); *I. C. C. v. Interstate Auto Shippers, Inc.*, 214 F.Supp. 473 (S.D.N.Y.1963); *I. C. C. v. Dudgeon*, 213 F.Supp. 710 (S.D.Cal.1961), cert. denied, 372 U.S. 960, 83 S.Ct. 1015, 10 L.Ed.2d 13 (1963).

a motor carrier's ***agent***, officer, or representative; an employee responsible for hiring, supervising, training, assigning, or dispatching a driver . . .

With regard to innocent members of the public, any act of the agent regarding the hiring, supervising, training, assigning, or dispatching a driver is thus an act of the motor carrier. However, the Court of Appeals erroneously held that notice to the agent, C&C, was not notice to the motor carrier, and acts of the agent were not acts of the motor carrier, even though this section defines "motor carrier" to include the agent. To reach that conclusion, the Court of Appeals used a strict, narrow and rigid interpretation of the Federal Motor Carrier Safety Regulations, ignoring this definition.

All three ATF entities jointly represented themselves to be a "motor carrier in interstate commerce" and jointly appointed C&C as their agent authorized to handle "all necessary and customary arrangements," which included hauling freight from shippers to a point of load consolidation. Therefore, an act of C&C in this context – and specifically in "hiring, supervising, training, assigning, or dispatching a driver" – is an act of all three ATF entities. If C&C was an unfaithful agent or failed to communicate with the ATF home office about selection and qualifications of drivers it hired and dispatched to haul ATF loads it was a matter addressed in the crossclaim, in which the jury awarded ATF \$539,566.25 against C&C. It is not a matter to be held against an innocent

member of the traveling public who was injured by the ATF/C&C/Carnley operation.

D. The Court of Appeals erroneously misconstrued 49 C.F.R. § 376.2, under which "lease" includes a "contract or arrangement."

Compounding the error of ignoring the definition of "motor carrier" that includes its "agent," the Court of Appeals also misinterpreted the following provisions of the Federal Motor Carrier Safety Regulations.

49 C.F.R. § 376.11 requires that a motor carrier put a lease in writing and include certain specific content. However, the case law is clear that when the requirement of a written lease is not followed, a lease will be implied in the absence of a written document.⁹

⁹ See, e.g., *Planet Insurance v. Transport Indemnity*, 823 F.2d 285 (9th Cir. 1987) ("No court has held that a written lease is a condition precedent to imposition of statutory liability on carrier lessees."); *Fuller v. Riedel*, 464 N.W.2d 97 (Wis. Ct. App. 1990) ("The cases are uniform in holding that the absence of a written trip lease is legally irrelevant."); *Wilson v. Riley Whittle, Inc.*, 145 Ariz. 317, 701 P.2d 575 (Ct.App. 1985) ("No court has held that a written lease is a condition precedent to imposition of statutory liability on carrier lessees," and "the absence of a written trip lease is legally irrelevant"); *Cheney v. Hailey*, 686 P.2d 808 (Colo. Ct. App. 1984) (agency as matter of law despite failure to observe formality of lease); *Johnson v. Pacific Intermountain Express Co.*, 662 S.W.2d 237 (Mo. 1983); *Ronish v. St. Louis*, 621 F.2d 949 (Mont. Ct. App. 1980) (liability of carrier in

(Continued on following page)

49 C.F.R. § 376.2 includes the following definition:

(e) Lease – A *contract or arrangement* in which the owner grants the use of equipment, with or without driver, for a specified period to an authorized carrier for use in the regulated transportation of property, in exchange for compensation.

The alternative and disjunctive reference to “contract or arrangement” must be given some significance other than mere redundancy. Dictionary definitions of the terms, in pertinent part, include:

contract: 1 a : an agreement between two or more persons or parties to do or not to do something : . . . 3 : a writing made by the parties to evidence the terms and conditions of a contract.

arrangement: 1 a : the act or action of arranging or putting in correct, convenient, or desired order . . . 2 : the style, manner, or

absence of a lease); *Wilson v. Riley Whittle, Inc.*, 145 Ariz. 317, 701 P.2d 575 (Ct.App.1985) (“the absence of a written trip lease is legally irrelevant”); *Fuller v. Riedel*, 159 Wis.2d 323, 464 N.W.2d 97 (Ct.App.1990) (finding statutory liability against a carrier lessee who entered into an oral trip lease a question of fact); *Cox v. Bond Transportation, Inc.*, 53 N.J. 186, 249 A.2d 579 (carrier lessee statutorily liable under an oral lease for an accident that occurred while the driver was on his way home), *cert. denied*, 395 U.S. 935, 89 S.Ct. 1999, 23 L.Ed.2d 450 (1969); *Zamalloa v. Hart*, 31 F.3d 911 (9th Cir. 1994) (statutory employer relationship could be formed via oral lease between carrier and owner of truck).

way in which things are arranged . . . 3 : a preliminary step or measure :

PREPARATION, PLAN . . . 4 a : a structure or combination of things arranged in a particular way or for a specific purpose : . . . 6 b (1) : a mutual agreement or understanding (as between persons or nations)¹⁰

“Contract” connotes some formality, often including a writing. “Arrangement” connotes less formality and makes no reference to writing. The use of both words in the disjunctive reflects awareness that in reality there would be sloppy situations, like this case, where there is no attempt to comply with anything. In order to protect the public, the rule is broad enough to reach motor carriers and drivers who do not even make a pretense of any formalities of documentation or of language. To determine whether an implied lease arrangement exists, the words used by scofflaws do not control, as a court examines the totality of the contacts between the parties, in which the parties’ subjective beliefs are only part of the analysis.¹¹ The inclusion of “or arrangement” in the regulation means that “lease” refers not to a “magic word” that must be used in order to protect the traveling public, but an economic and functional reality to be examined in the context of the case.

¹⁰ Webster’s Third New International Dictionary, Unabridged (Merriam-Webster, 2002)

¹¹ *Great West Cas. Co. v. Carolina Cas. Ins. Co.*, 2006 WL 1704125 (Minn.App.,2006).

The motor carrier under 49 C.F.R. § 392.1 has a duty of management, hiring, supervision, training, assigning and dispatching of commercial motor vehicles and drivers. It is in a better position than an innocent motorist on the highway to police its own agents and operations and assure the compliance with the regulations. The transferring of economic burdens to the innocent injury victim violates fundamental doctrines of tort law which the Court of Appeals completely disregarded.¹²

"Practical control" is sufficient to impose liability in an "arrangement" with a driver in the absence of a lease. In *Hogan v. J. Higgins Trucking, Inc.*, 197 S.W.3d 879 (Tex.App.-Dallas, 2006), there was no pretense of a lease on a truck driven by an employee of a subcontractor of the motor carrier. Liability was imposed under theory of practical control under state law, which was applied because the driver was employed by a subcontractor rather than by the motor carrier or its agent. In this case, practical control was exercised by an actual agent of the motor carrier which under 49 C.F.R. § 390.5 is included in the definition of the motor carrier. This is enough to create a jury question of an "arrangement" sufficient to imply a lease under 49 C.F.R. § 376.2. To determine if the evidence is sufficient to imply a lease arrangement, regardless of the terminology used, a court

¹² See generally W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 6 (5th ed. 1984).

examines the totality of the contacts between the parties, in which the parties' subjective beliefs are only part of the analysis.¹³ Therefore, construing the FMCSR to effectuate its remedial purpose, the parties' denial of the existence of a lease is not controlling when their informal arrangement fits the definition, as it does in this case.

E. The Court of Appeals ignored 49 C.F.R. § 392.1, which requires that motor carriers and their agents be responsible for management and operation of commercial motor vehicles, and for hiring, supervising, assigning and dispatching drivers, must be instructed in and comply with the FMCSR.

The Court of Appeals ignored 49 C.F.R. § 392.1, which requires:

Every motor carrier, its officers, *agents*, representatives, and employees responsible for the management, maintenance, operation, or driving of commercial motor vehicles, or the hiring, supervising, training, assigning, or dispatching of drivers, *shall be instructed in and comply with the rules* in this part.

Thus ATF, directly and through its agent C&C, had a duty to manage and instruct, and to assure that it and its agent C&C would hire, supervise,

¹³ *Great West, supra* at note 11.

train, assign and dispatch drivers in compliance with the FMCSR. It is undisputed in this case that ATF totally failed to comply with this regulation. Again, the burden of that failure is a matter best addressed in ATF's crossclaim against its agent, C&C, and must not be cast upon an innocent motorist who was injured due to that failure.

F. The Court of Appeals ignored 49 C.F.R. § 371.2(a), which defines a property broker.

The Court of Appeals ignored 49 C.F.R. § 371.2(a), which provides:

Broker means a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier. *Motor carriers, or persons who are employees or bona fide agents of carriers, are not brokers* within the meaning of this section when they arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport.

By definition, brokers do not themselves move freight on the road. The ATF entities jointly represented themselves as a "a motor carrier in interstate commerce," and no other motor carrier was associated with moving this load. Whether or not ATF acted as a broker in other respects, it could not be functioning as

a broker when the load was hauled from the shipper to the point of consolidation.

G. The Court of Appeals ignored 49 C.F.R. § 371.7(b), which prohibits a broker from misrepresenting itself as a motor carrier.

The Court of Appeals ignored 49 C.F.R. § 371.7(b), which provides:

A broker shall not, directly or indirectly, represent its operations to be that of a carrier. Any advertising shall show the broker status of the operation.

The natural and logical consequence of a broker representing itself as a motor carrier, contributing to confusion regarding its status, is that it will be treated as a carrier if it has not clearly delineated the broker role.¹⁴ The policy reason for 49 C.F.R. § 371.7(b) is illustrated in *KLS*¹⁴ and in this case. Shippers and others rely upon motor carriers to exercise the responsibility required of motor carriers under the FMCSR. If a combination of trucking related entities represent themselves jointly as a motor carrier, all concerned should be able to rely upon that representation and all it implies regarding responsibility for compliance with the safety and financial responsibility provisions of the FMCSR.

¹⁴ See, e.g., *KLS Air Express, Inc. v. Cheetah Transp. LLC*, 2007 WL 2428294 (E.D.Cal., 2007).

It is undisputed that a freight broker does not have a role in the actual assembly (consolidation) or carriage (transportation) of the goods (freight).¹⁵ Therefore, ATF could not be operating as a broker in the physical process of consolidating freight through its agent C&C dispatching trucks and drivers to pick up freight.

If, as the Court of Appeals ruling would have it, a trucking related enterprise is allowed to represent all its related entities jointly as a motor carrier in interstate commerce, never revealing anything to the contrary, and then dance away from all responsibility by making an uncorroborated *post hoc* contention that only its broker entity was involved, acting solely as a broker, the adverse nationwide impact on highway safety is obvious.

As in *KLS, supra*, viewing this evidence in the light most favorable to supporting the verdict, a reasonable fact finder could find that the ATF entities jointly served as a "carrier," rather than ATF Logistics alone as a "broker," pertaining to the subject shipment.¹⁶ Where there are disputed questions of fact regarding status as a carrier or a broker, it is an issue of fact for a jury to determine, as the jury did determine in this case. The Court of Appeals thus

¹⁵ *Transportation Revenue Management, Inc. v. First NH Investment Services Corp.*, 886 F.Supp. 884, 886 (D.D.C. 1995).

¹⁶ See, e.g., *Phoenix Assur. Co. v. K-Mart Corp.*, 977 F.Supp. 319 (D.N.J., 1997).

erred both in misinterpreting the FMCSR and in usurping the role of the jury on this issue.

H. The Court of Appeals disregarded 49 U.S.C.A. § 13102(8) which defines a “freight forwarder.”

Additional support for reinstating the trial court’s judgment is found in the definition of “freight forwarder” in 49 U.S.C.A. § 13102(8), on which the jury was instructed [Vol. 5, T. 638.23-639.2]. It provides:

A “freight forwarder” is defined as “a person holding itself out to the general public (other than as a pipeline, rail, motor, or water carrier) to provide transportation of property for compensation and in the ordinary course of its business – (A) assembles and consolidates, or provides for assembling and consolidating, shipments and performs or provides for break-bulk and distribution operations of the shipments; (B) assumes responsibility for the transportation from the place of receipt to the place of destination; and (C) uses for any part of the transportation a carrier subject to jurisdiction under this subtitle.

A freight forwarder who never actually handles the goods is little more than a travel agent. However, a company that arranges to ship a customer’s goods by truck from door to door under one single bill, with the customer not necessarily knowing what carrier would haul the load, is “forwarder-common carrier,”

rather than mere "freight forwarder," and, therefore owes the duties of common carrier.¹⁷

Thus, the operation of ATF and its agent C&C also fit the definition of a "forwarder-common carrier," even though they never used that terminology, and ATF is responsible for the injury caused by the unqualified driver its agent informally hired and dispatched to pick up and consolidate freight for ATF with no authority other than that of ATF.

I. The FMCSR must be construed to avoid the unreasonable and absurd result of immunizing from accountability a motor carrier that does not fulfill its legal duties, and shifting the burden of loss to an innocent member of the public.

This Court has long recognized that the intent of legislation must be upheld to prevent absurd or unjust results from overly literal interpretation.

To give effect to the intention of the legislature, courts are not controlled by the literal meaning of the statute, but the spirit or

¹⁷ See, e.g., *Chicago, Milwaukee, St. Paul & Pac. R. Co. v. Acme Fast Freight, Inc.*, 336 U.S. 465, 484, 69 S.Ct. 692, 93 L.Ed. 817 (1949); *ABN Amro Verzekeringen BV v. Geologistics Americas, Inc.*, 253 F.Supp.2d 757 (S.D.N.Y.,2003); *Royal Ins. Co. (U.K.) v. Fountain Technologies, Inc.*, 984 F.Supp. 724 (S.D.N.Y.,1997); *Royal Ins. v. Amerford Air Cargo*, 654 F.Supp. 679 (S.D.N.Y.,1987).

intention of the law prevails over the letter thereof. Where the letter of the statute results in absurdity or injustice or would lead to contradictions, the meaning of general language may be restrained by the spirit or reason of the statute. . . . It is the duty of the court to consider the results and consequences of any proposed construction and not so construe a statute as will result in unreasonable or absurd consequences not contemplated by the legislature.¹⁸

Where necessary to effectuate the purpose of a provision, a court may infer what is required to supply a deficiency consistent with legislative intent.¹⁹ Thus, where the FMCSR requires a written lease, a motor carrier must not be allowed to dodge accountability by failing to do what it was required to do. Rather, in construing the remedial statute and regulations to effect the remedial purpose, the court should infer the lease that the law required.

The result of the Court of Appeals decision in this case is unreasonable and absurd, as it relies upon semantics rather than substance to authorize the practice that the lease requirement and statutory employer rule was designed to prevent, simply because the word "lease" was not used in an informal

¹⁸ See, e.g., *Hardwick v. State*, 264 Ga. 161, 442 S.E.2d 236 (1994); *Barton v. Atkinson*, 228 Ga. 733, 738-739, 187 S.E.2d 835 (1972); see also, *Wood v. N.Y. Life Ins. Co.*, 255 Ga. 300, 303, 336 S.E.2d 806 (1985).

¹⁹ Sutherland, STATUTORY CONSTRUCTION, § 55:3.

arrangement that made no pretense of any attempt to comply with the FMCSR in the transportation of freight in interstate commerce.

J. The Court of Appeals further compounded its error in ignoring and misconstruing provisions of the FMCSR when it also rejected liability under RESTATEMENT (SECOND) OF TORTS § 428.

RESTATEMENT (SECOND) OF TORTS § 428 provides that

An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for physical harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity.

Prior to adoption of the statutory employer rule under the FMCSR, this Restatement rule was the means to hold motor carriers accountable for the negligence of "independent" drivers who hauled for them. Georgia followed this section of the Restatement in *Black v. Montgomery Trucking Co., Inc.*²⁰ The Court of Appeals brushed aside consideration of

²⁰ 129 Ga.App. 36, 198 S.E.2d 378 (1973) (followed Restatement rule), reversed on other grounds without mention of either Restatement rule or federal statutes or regulations, 231 Ga. 211 (1973)

Restatement § 428 by stating that “C&C was not “carrying on the activity” of ATF when it hired Wesley Carnley.” As the agent of ATF with no motor carrier authority other than that of ATF which authorized C&C to make “all necessary and customary arrangements” for consolidation of freight loads, C&C was included within the definition of the motor carrier under 49 C.F.R. § 390.5. The Court of Appeals erred in holding C&C was not “carrying on the activity” of ATF.

II. In addition to misconstruing the Federal Motor Carrier Safety Regulations and usurping the jury’s role, the Court of Appeals further compounded its error by misconstruing and misapplying its own decision in *McLaine v. Mcleod*,²¹ 661 S.E.2d 695 (2008) regarding broker liability.

But for the Court of Appeals ignoring or misconstruing both law and evidence, as discussed above, the question of broker liability would not even be considered. In erroneously considering the broker liability issue, however, the Court of Appeals further erred in the application of its own *McLaine* decision, ignoring four major distinctions. Procedurally, *McLaine* was a summary judgment case with no evidence that Container South was ever anything other than a pure

²¹ *McLain v. Mcleod*, 291 Ga.App. 333, 661 S.E.2d 695 (2008)

freight broker, while this case is an appeal from a jury verdict in which ATF's hotly disputed "just a broker" contention was rejected by the jury. In *McLaine* the contract clearly identified Container South as a broker only and Kight Trucking as the motor carrier, while here the contract identified all three ATF entities jointly and collectively as "a motor carrier in interstate commerce;" there was no other motor carrier involved at the time of the crash and no contemporaneous evidence that only ATF Logistics was involved only as a broker. Regarding selection and qualifications of truck driver, in *McLaine* the driver was selected by Kight Trucking, a qualified motor carrier, and had a valid Commercial Driver's License, (CDL) while here the truck driver hired by ATF, through its agent C&C was physically disqualified from ever obtaining a CDL. "Motor carrier" includes any "agent" of the motor carrier. Finally, *McLaine* was all about attempting to extend liability to a pure freight broker beyond anything provided in the FMCSR and included no citations to the FMCSR, while this case was litigated primarily under the FMCSR.

WHEREFORE, Petitioner prays that this honorable Court grant a writ of certiorari, reverse the Court of Appeals decision, and reinstate the judgment of the trial court.

Attorneys for Petitioner:

/s/ Norman S. Fletcher
NORMAN S. FLETCHER
Georgia Bar No. 264100
Brinson, Askew, Berry, Seigler,
Richardson and Davis
615 West First Street
P.O. Box 5007
Rome, GA 30162-5007
Phone: 706-291-8853
Fax: 706-234-3574
nsfletcher@brinson-askew.com

/s/ Kenneth L. Shigley
KENNETH L. SHIGLEY
Georgia Bar No. 642744
Shigley Law Firm, LLC
3166 Mathieson Drive, NE, Suite 200
Atlanta, Georgia 30305-1826
Telephone: (404) 364-1999
Facsimile: (404) 364-0880
E-mail: ken@shigleylaw.com

THOMAS L. MADDOX
Georgia Bar No. 465514
201 Bombay Lane
Roswell, Georgia 30076
Telephone: (678) 762-1632
Facsimile: (770) 641-6003

CERTIFICATE OF SERVICE

This is to certify that I have served opposing counsel in the above-styled matter with a copy of **APPELLEE'S PETITION FOR A WRIT OF CERTIORARI** by depositing in the United States Mail a copy of the same, with adequate postage affixed thereon, addressed to the following:

James F. Fisher, II, Esq.
Denise W. Spitalnick, Esq.
W. Scott Henwood, Esq.
Hall, Booth, Smith & Slover, PC
1180 West Peachtree Street, NW
Atlantic Center Plaza, Suite 900
Atlanta, GA 30309-3479

This the 19th day of August, 2008.

Respectfully submitted,

/s/ Kenneth L. Shigley
Kenneth L. Shigley

APPENDIX O
IN THE SUPREME COURT
STATE OF GEORGIA

BRENT DEE JOHNSON,

Petitioner

vs.

**CLARENDON NATIONAL
INSURANCE COMPANY,
AMERICAN TRANS-
FREIGHT LLC,
ATF TRUCKING, LLC, and
ATF LOGISTICS, LLC,**

Respondents.

— Supreme Court Docket
No. S08C2066
Court of Appeals
No. A08A0119

MOTION FOR RECONSIDERATION

(Filed Nov. 26, 2008)

Attorneys for Petitioner:

NORMAN S. FLETCHER

Georgia Bar No. 264100

Brinson, Askew, Berry,

Seigler, Richardson

and Davis

615 West First Street

P.O. Box 5007

Rome, GA 30162-5007

Phone: 706-291-8853

Fax: 706-234-3574

nsfletcher@brinson-askew.com

KENNETH L. SHIGLEY

Georgia Bar No. 642744

Chambers, Aholt &

Rickard, LLP

1360 Peachtree Street,

Suite 910

Atlanta, Georgia 30309

Phone: 404.253.7866

Fax: 404.253.7875

Email: ken@carllp.com

TOMMY L. MADDUX
Georgia Bar No. 465514
201 Bombay Lane
Roswell, Georgia 30076
Telephone:
(678) 762-1632
Facsimile:
(770) 641-6003

This Court denied Petitioner's Petition for Writ of Certiorari by order dated November 17, 2008, a copy of which is attached as Exhibit A. Petitioner asks this Court to grant this his Motion for Reconsideration and his Petition for Writ of Certiorari for the following reasons, all of which are extremely important to the traveling public of Georgia.

I. THE IMPACTS UPON SAFETY OF ALL WHO SHARE HIGHWAYS WITH COMMERCIAL TRUCKS, AND UPON HEALTH OF THE TRUCKING INDUSTRY, MAKE THIS A CASE ONE OF GREAT CONCERN, GRAVITY AND IMPORTANCE TO THE PUBLIC.

It appears that Petitioner has thus far failed to adequately drive home to the Court the ramifications of this case for safety of innocent people on the highways.

The Court of Appeals ruling is the only court decision in the United States that enables interstate motor carriers to evade financial responsibility for owner-operator drivers hauling freight for them, simply by having their agents avoid the use of the

word "lease" in informally hiring trucks and drivers. Violation of one regulation which requires execution of a lease would thus exempt carriers from all responsibility for compliance of such trucks and drivers with all the rest of the Federal Motor Carrier Safety Regulations.

The Court of Appeals decision reflects a fundamental lack of understanding of federal motor carrier law, even to the point of failing to recognize the distinction between shippers and motor carriers. As authority for not applying the federal statutory employer rule to hold a motor carrier vicariously liable for totally noncompliant, unqualified owner-operator hired by the carrier's agent, the Court relied upon a case that found a shipper (*not* a motor carrier) was not vicariously liable for negligence of an independent trucker (who *was* a motor carrier). *Caballero v. Archer*, 2007 U.S. Dist. LEXIS 12271, 2007 WL 628755 (W.D.Tex., 2007). It is axiomatic that FMCSR leasing rules have never applied to relationships between shippers and motor carriers, so the case upon which the Court relied has nothing to do with this case. Consistent with such fundamental confusion about motor carrier law, and completely ignoring the overwhelming evidence that supported the jury's verdict, the Court of Appeals also ignored or restrictively misconstrued:

- 49 C.F.R. § 376.2 which defines "lease" to include "contract *or* arrangement";

- 49 C.F.R. § 390.5 which defines "motor carrier" to include "motor carrier's agent"; and
- 49 C.F.R. § 392.1 which provides that *motor carriers and their agents are responsible for management, hiring, supervision, training, assigning and dispatching of commercial motor vehicles and drivers.*

If this decision stands, it is foreseeable that a segment of the trucking industry will seek to exempt themselves from financial responsibility to the public by evading the use of the word "lease" in informally hiring, through agents, owner-operators who make no pretense of complying with anything. With no financial accountability for such trucks and drivers, they will then have no financial incentive to supervise driver qualifications, hours of service, safety of equipment, and other provisions of the FMCSR. The law-abiding majority of motor carriers and owner-operators will thus be subjected to unfair competition with those who cut costs by using the loophole the Georgia Court of Appeals has created.

As bad drives out good, the potentially lethal consequences for anyone who shares highways with trucks are inescapable. The Court of Appeals has greased a slippery slope back more than half a century to the bad old days of motor carriers shielding themselves from responsibility to the public by use of unqualified and financially irresponsible "independent contractor" truckers.

A decision that demonstrates such a constrictive misunderstanding of motor carrier law should not be allowed to serve as a precedent creating a loophole that would eviscerate the Federal Motor Carrier Safety Regulations to the detriment of the traveling public. While this case is one of first impression in this Court, the Court of Appeals decision is dead wrong in light of the national body of interstate motor carrier law. This case presents an excellent opportunity for this Court to assure Georgians are no less protected by the Federal Motor Carrier Safety Regulations than are citizens of other states.

II. THIS CASE MEETS THE CRITERIA FOR GRANTING OF CERTIORARI IN THE UNITED STATES SUPREME COURT, WHICH QUALIFIES IT AS A CASE OF GREAT CONCERN, GRAVITY AND IMPORTANCE TO THE PUBLIC.

a. THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THE U.S. SUPREME COURT.

The Court of Appeals construed the FMCSR in a narrow, restrictive manner to defeat the motor carrier's financial responsibility for a driver casually hired to haul an interstate shipment, thereby enabling motor carriers to evade financial responsibility by having the carrier's agent informally hire a truck and driver, omitting use of the word "lease" even though 49 C.F.R. § 376.2 defines "lease" to include, in the disjunctive, "contract *or* arrangement."

- The Motor Carrier Act is remedial legislation, and should be given liberal interpretation.¹
- Federal safety legislation is to be liberally construed to effectuate the congressional purpose.²
- "Federal regulations have no less pre-emptive effect than federal statutes."³
- Allowing avoidance of motor carrier financial responsibility for owner-operators as independent contractors "is an unnatural construction of the Act which would require the Commission to sit idly by and wink at practices that lead to violations of its provisions."⁴

¹ *Crescent Express Lines v. U.S.*, 320 U.S. 401, 409, 64 S.Ct. 167, 88 L.Ed. 127 (1943); *McDonald v. Thompson*, 305 U.S. 263, 59 S.Ct. 176, 83 L.Ed. 164 (1938); *Piedmont & N. Ry. Co. v. ICC*, 286 U.S. 299, 52 S.Ct. 541, 76 L.Ed. 1115 (1931).

² *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13, 100 S.Ct. 883, 63 L.Ed.2d 154 (1980); *U.S. v. Bacto-Unidisk*, 394 U.S. 784, 798, 89 S.Ct. 1410, 1418, 22 L.Ed.2d 762 (1969); *Lilly v. Grand Trunk R. Co.*, 317 U.S. 481, 486, 63 S.Ct. 347, 351, 87 L.Ed. 411 (1943).

³ *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985).

⁴ *American Trucking Ass'ns v. United States*, 344 U.S. 298, 301 (1953).

b. THE COURT OF APPEALS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT AND UNITED STATES COURTS OF APPEAL.

With its strict and narrow construction of the FMCSR, the Court of Appeals decision enables motor carriers to circumvent all financial responsibility for owner-operator drivers by simply avoiding use of the word "lease" – where a lease is required by law – by allowing an agent to hire a truck and driver who makes no pretense of complying with any motor carrier regulations.

▪ **Fifth and Eleventh Circuits:**

*"It is sufficient for us to say that the [Motor Carrier Act] is a highly remedial one, that its terms are broadly comprehensive enough to bring within them all of those who, no matter what form they use, are in substance engaged in the business of interstate or foreign transportation of property on the public highways for hire. . . ."*⁵

▪ **Fifth Circuit:**

FMCSR's *"preempt state law in tort actions in which a member of the public is injured by the negligence of a motor carrier's employee while operating an interstate carrier vehicle, [as] "it is critical that ICC [now FMCSR] regulations and*

⁵ *Georgia Truck System, Inc. v. I.C.C.*, 123 F.2d 210 (5th Cir.1941).

the lease mandated by them have supreme controlling significance. . . . “[The motor] *carrier’s liability for equipment and drivers covered by leasing arrangements is not governed by the traditional common law doctrine of master-servant relationships and respondeat superior.*”⁶

▪ **Seventh Circuit:**

“These rules were intended to safeguard the public by *preventing authorized carriers from circumventing applicable regulations by leasing the equipment and services of independent contractors exempt from federal regulation.*”⁷

▪ **Ninth Circuit:**

- “*It would defeat the intent [of the statute] to enable carriers to benefit from their own failure to comply with ICC [now FMCSA] regulations.*”⁸

▪ **Arizona:**

“Under 49 C.F.R. § 1057.2(e), *lease* is expansively defined as ‘A contract or arrangement . . .’ We believe this extends to any arrangement by which an authorized carrier allows another to utilize its ICC authority for the interstate transportation of goods. *Were we to rule otherwise, that transportation could be made by uninsured truckers and the Congressional policy of requiring financially*

⁶ *Price v. Westmoreland*, 727 F.2d 494 (5th Cir. 1984).

⁷ *Hartford Ins. Co. v. Occidental Fire & Cas. Co.*, 908 F.2d 235 (7th Cir. 1990).

⁸ *Zamalloa v. Hart*, 31 F.3d 911 (9th Cir. 1994).

responsible interstate transportation would be defeated."⁹

▪ **Missouri:**

"It is no defense for a motor carrier to choose "not try to place the load with a regular, certified carrier . . . but rather [to do] business with *itinerant truckers with no semblance of operating authority.*"¹⁰

▪ **New Jersey:**

"The regulations . . . have the force and effect of law. A franchised interstate carrier cannot evade them by making an oral or a written lease with an owner-operator of equipment for a trip, for a day or for an indefinite period, which attempts to exclude or to limit their application. . . . Thus *when a lessor-operator is engaged by the carrier for operation within the scope of the regulations he becomes what has been described as a 'statutory' employee of the carrier, . . . and the relation between them, whether oral or written, is governed by the regulations.*"¹¹

⁹ *Transamerica Ins. Co. v. Maryland Cas. Ins. Co.*, 166 Ariz. 219, 801 P.2d 454 (1990).

¹⁰ *Johnson v. Pacific Intermountain Express Co.*, 662 S.W.2d 237 (Mo. 1983).

¹¹ *Cox v. Bond Transp., Inc.*, 53 N.J. 186, 249 A.2d 579 (N.J. 1969).

III. THE GREAT CONCERN, GRAVITY AND IMPORTANCE TO THE PUBLIC OF THIS CASE WAS ACKNOWLEDGED BY RESPONDENT'S CHOICE NOT TO RESPOND TO CRITICAL ASSERTIONS IN THE PETITION.

Under Rule 42, Respondent is deemed to acknowledge key points in the Petition to which there was no response:

"The Court of Appeals decision eviscerates key provisions of the Federal Motor Carrier Safety Regulations (FMCSR) through selective, narrow and restrictive construction thereby defeating the purpose of the regulations, rather than following the rule of the liberal construction which is used throughout the nation to effectuate the remedial purpose of the FMCSR." [Petition 2; no response; acknowledged under Rule 42]

"The Court of Appeals decision undermines the national system of motor carrier safety regulation. It subjects law-abiding motor carriers and independent owner-operators to unfair price competition, as it condones the use of noncompliant 'independent' truckers hauling freight in interstate commerce without complying with financial responsibility, driver qualification and safety rules under the Federal Motor Carrier Safety Regulations." [Petition 2; no response; acknowledged under Rule 42]

"Contrary to more than half a century of clearly established national public policy, the Court of Appeals has rendered the first

known court decision, since the adoption in 1956 of the statutory employee rule for interstate trucking that permits motor carriers to avoid responsibility for damages caused by unqualified truck drivers hauling freight for them in a manner never approved by any other court in the United States." [Petition 2; no response; acknowledged under Rule 42]

Wherefore, Petitioner requests this Court to grant this motion so that this Court can grant certiorari and issue its opinion rectifying the damage done to the body of motor carrier safety law by the Court of Appeals.

Attorneys for Petitioner:

/s/ Norman S. Fletcher (KLS)
NORMAN S. FLETCHER
Georgia Bar No. 264100
Brinson, Askew, Berry, Seigler,
Richardson and Davis
615 West First Street
P.O. Box 5007
Rome, GA 30162-5007
Phone: 706-291-8853
Fax: 706-234-3574
nsfletcher@brinson-askew.com

/s/ Kenneth L. Shigley
KENNETH L. SHIGLEY
Georgia Bar No. 642744
Chambers, Aholt & Rickard, LLP
1360 Peachtree Street, Suite 910
Atlanta, Georgia 30309
Phone: 404.253.7866

App. 282

Fax: 404.253.7875

Email: ken@carllp.com

THOMAS L. MADDOX

Georgia Bar No. 465514

201 Bombay Lane

Roswell, Georgia 30076

Telephone: (678) 762-1632

Facsimile: (770) 641-6003

CERTIFICATE OF SERVICE

This is to certify that I have served opposing counsel in the above-styled matter with a copy of the **Motion for Reconsideration** by depositing in the United States Mail a copy of the same, with adequate postage affixed thereon, addressed to the following:

James F. Fisher, II, Esq.

Denise W. Spitalnick, Esq.

W. Scott Henwood, Esq.

Hall, Booth, Smith & Slover, PC

1180 West Peachtree Street, NW

Atlantic Center Plaza, Suite 900

Atlanta, GA 30309-3479

This the 26th day of November, 2008.

Respectfully submitted,

/s/ Kenneth L. Shigley

Kenneth L. Shigley

Georgia Bar No. 642744

Attorney for Petitioner

App. 283

Chambers, Aholt & Rickard, LLP
1360 Peachtree Street, Suite 910
Atlanta, Georgia 30309
Phone: 404.253.7866
Fax: 404.253.7875
Email: ken@carllp.com
